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95TH CONGRESS
2d Session

} HOUSE OF REPRESENTATIVES {

REPORT
No. 95-996

MOVIE RATINGS AND THE INDEPENDENT PRODUCER

A REPORT OF THE SUBCOMMITTEE ON SPECIAL SMALL BUSINESS PROBLEMS OF THE COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES NINETY-FIFTH CONGRESS SECOND SESSION



MARCH 21, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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WASHINGTON : 1978

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LETTERS OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, D.C., March 21, 1978.

HON. THOMAS P. O'NEILL, JR.,
The Speaker, U.S. House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Transmitted herewith is a report of the Subcommittee on Special Small Business Problems entitled "Movie Ratings and the Independent Producer."

This report is submitted with the approval of the full committee. With best wishes, I am

Sincerely,

NEAL SMITH, *Chairman.*

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, D.C., March 13, 1978.

HON. NEAL SMITH,
Chairman, Committee on Small Business, U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Transmitted herewith is a report of the Subcommittee on Special Small Business Problems entitled "Movie Ratings and the Independent Producer."

The report, transmitted to you as chairman of the Committee on Small Business, has the approval of the subcommittee.

Sincerely,

MARTY RUSSO,
Chairman, Subcommittee on Special
Small Business Problems.

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Union Calendar No. 499

95TH CONGRESS } 2d Session }	HOUSE OF REPRESENTATIVES {	REPORT No. 95-996
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MOVIE RATINGS AND THE INDEPENDENT PRODUCER

MARCH 21, 1978.—Committed to the Committee of the Whole House on the
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Mr. SMITH of Iowa, from the Committee on Small Business,
submitted the following

REPORT

MOVIE RATINGS AND THE INDEPENDENT PRODUCER

I. INTRODUCTION

The Committee on Small Business of the U.S. House of Representatives created six subcommittees at the beginning of the 95th Congress, each of which was given specific fields for investigation. The Subcommittee on Special Small Business Problems was assigned jurisdiction over the Federal Communications Commission and related communications issues, among other areas.

The following members were appointed to the subcommittee:

Representative Marty Russo, chairman
Representative Ike Skelton
Representative Richard Nolan
Representative Andy Ireland
Representative Dale E. Kildee
Representative James C. Corman
Representative Wyche Fowler, Jr.¹
Representative William S. Broomfield, ranking minority member
Representative Millicent Fenwick
Representative Dan Marriott

Stephen P. Lynch was appointed professional staff member to the subcommittee in the position of majority counsel. Marvin W. Topping was appointed to the position of minority counsel. Linda Parker was assigned to the subcommittee as clerical assistant. Kenneth H. Davidson was assigned by the full committee to assist the subcommittee in the movie ratings investigation.

PURPOSE AND SCOPE OF THE HEARINGS

At an organizational meeting of the subcommittee on Thursday, March 7, 1977, members discussed several possible areas of investigation. One of the areas approved was the effect of movie ratings on the Nation's independent producers.

Several independent producers had complained to the subcommittee and its predecessor in the 94th Congress that the voluntary rating code of the Nation's motion picture industry discriminated against independent producers. This allegedly was being accomplished by the awarding of more restrictive ratings to independent producers, while the nine major studios would be given softer ratings for the same type of film. Thus, the rating code was supposedly being used to the economic benefit of the major studios and the economic detriment of the smaller independents.

¹ Wyche Fowler, Jr., was appointed to the Committee on Small Business on Apr. 20, 1977.

II. THE MOTION PICTURE INDUSTRY: AN OVERVIEW

Since its earliest days, the American film has enjoyed enormous popularity here and around the world. Stars like Charlie Chaplin, Tom Mix, Douglas Fairbanks, and Mary Pickford from the silent era—and Clark Gable, Humphrey Bogart, Gary Cooper, and Marilyn Monroe from the sound era—have lit up the world's screens with their performances. Directorial giants such as D. W. Griffith, John Ford, John Huston, and Orson Welles, and the master of animation, Walt Disney, blended the talents of actors, cinematographers, and many other craftspeople to produce film masterpieces like "Birth of a Nation," "Stagecoach," "Citizen Kane," and "Snow White."

Entrepreneurs such as Samuel Goldwyn, William Fox, Jack Warner, and Louis B. Mayer created entertainment empires that were highly profitable. Films were turned out at a tremendous pace—sometimes as many as 50 a year per studio—to satisfy the ever-hungry appetite the public exhibited for the "moving pictures."

Huge numbers of people, from directors to stars to extras, prop men to cinematographers, costume designers to dialog coaches, were employed to provide the product to theaters across the country (a great number of which were owned by the studios) and around the world. One photograph—a massive group sitting made for Life magazine in 1943—provides one of the most graphic examples of studio power and influence. In the center of the first row sat Louis B. Mayer, the head of Metro-Goldwyn-Mayer. Surrounding Mayer were MGM's stable of contract players (actors and actresses signed to do MGM pictures exclusively)—64 people including such personalities as Katharine Hepburn, Spencer Tracy, James Stewart, Lucille Ball, Red Skelton, Mickey Rooney, and Gene Kelly. Among those missing from the photograph were Clark Gable and Judy Garland.

Columbia Studio's colorful executive Harry Cohn summed up his opinion of the movie business very succinctly. "It's not a business," said Harry, "it's a racket." A bit harsh, perhaps, but there was little doubt that the industry was a very profitable concern. Prior to 1920, Charlie Chaplin and Mary Pickford each received \$1 million contracts; and D. W. Griffith's classic "Birth of a Nation" rolled up an impressive \$5 million in United States and Canadian rentals.

In 1929, the U.S. Department of Commerce began compiling financial data on the industry. In that year, box office receipts were listed at \$720 million. The figure rose by \$12 million to \$732 million in 1930. Between 1931 and 1939—the Depression years—the figures entered a period of flux, reaching a low of \$482 million in 1933 and a high of \$676 million in 1937. The country began pulling out of its economic depression in the late thirties, and in 1940 box office receipts reached \$735 million. Between 1940 and 1946, box office receipts more than doubled, reaching a staggering \$1,692 million in 1946.

Post-World War II was a very prosperous era for the American economy. Between 1945 and 1950, the gross national product jumped

from \$212.3 billion to \$286.2 billion, and by 1955 it reached \$399.3 billion. While the rest of the economy boomed, box office receipts began sliding. From the 1946 record high of \$1.7 billion, it slid to \$1.37 billion in 1950, dropping to \$1.18 billion in 1953. It rallied to \$1.39 billion in 1956, but dropped below \$1 billion for the first time since 1941, reaching \$992 million in 1958.²

A number of factors figured in the decline of revenues. Television, which had been developed prior to World War II and shelved due to the war effort, began making inroads as individual stations started affiliating with the networks—CBS, NBC, and later ABC—which radio stations had done previously. Postwar prosperity opened up new freedom for the American public to travel and engage in various leisuretime activities. Going to the movies became one of a number of alternatives, rather than the major recreational activity. A measure of this factor is found in Department of Commerce figures which show the percentage U.S. recreation expenditures the movies represent. Between 1929 and 1946, between 16 and 25 percent of the American recreation dollar was spent in motion picture theater admissions. From 1947 to 1967, the percentage declined from 17.23 percent to 3.53 percent.

The industry, which had looked upon their audience as homogeneous, began to specialize—to make movies that appealed to specific types of people. Motion picture admissions hit \$951 million in 1964 after nearly 20 years of decline. In 1965, the admissions figure rose above \$1 billion once again, and by 1977 hit \$2.37 billion.

Today, the feature motion picture represents only a portion of the industry's interests. Warner Brothers, the studio that made "The Jazz Singer," has become part of Warner Communications—a massive enterprise involved in record companies, book publishing, and cable television. Walt Disney Productions, home of the premier animation and family entertainment movies, has extended its fantasy concept into two "theme" parks: Disneyland in California and Disney World in Florida. Universal has become one of the giant entertainment factories, turning even studio tours into a business.

The feature motion picture industry has embraced television and become its chief supplier. The Hollywood television production chart published in *Variety's* October 6, 1977, issue, listed 48 series or special programs being produced by Universal, MGM, Warner Brothers, Twentieth Century-Fox, Columbia Pictures, and Walt Disney Productions.

From Edison's New Jersey lab, the motion picture has moved through time and space, enjoying great growth, enduring stagnation and institutional upheaval, adjusting to new realities, and once again beginning a growth cycle which, as of this report, shows no signs of slowing. There are problems such as the financial strain exhibitors, particularly the smaller ones, are facing due to a shortage of films and ever-increasing rental demands, and the difficulties independent producers face in financing and distributing their films. Yet the industry, along with the rest of the American economy, is accustomed to overcoming obstacles, and when the axiom "What's past is prologue" is applied, the future looks bright indeed.

² The source for these and other figures in this chapter is the U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of Economic Analysis (*Survey of Current Business*).

III. THE ADVENT OF RATINGS

A. INTRODUCTION

Actually, a more appropriate title for this chapter would be "Why Industry Self-Regulation?" The movie rating system represents the most recent development in a long history of industry self-regulation. Prior to delving into that history, it should be recognized that this chapter is intended as a brief overview. For those interested in further information in this area, please consult the selected readings list following this chapter.

B. WHY INDUSTRY SELF-REGULATION?

There appears to be a simple answer—pressure. The pressure emanated from a number of sources and resulted in a number of municipal ordinances and State laws passed to impose local or State standards on the new medium. The industry also received pressure from the Federal level, but no single "censor" authority was ever established on a national basis.

C. CHICAGO AND NEW YORK: MUNICIPAL CENSORSHIP

Chicago and New York were among the earliest municipalities involved in local censorship of the motion picture. In 1907, a Chicago judge wrote in one of the city's newspapers that the nickelodeons were causing more juvenile crime to be processed in his courtroom than all other causes combined.¹ The Chicago Tribune seemed to echo the judge's sentiments when it editorialized about the "5 cent theaters," saying that their influence was "wholly vicious" and calling for their suppression.²

On November 4, 1907, the Chicago City Council passed an ordinance of censorship effective November 19, 1907. The ordinance gave the General Superintendent of Police the power to issue permits for the exhibition of motion pictures. Although legal assaults were mounted against it, the ordinance was upheld by both the Illinois State and U.S. Supreme Courts. Official prior censorship had now become a reality.

Meanwhile, in New York the motion picture was enjoying its biggest audiences and would receive its biggest challenge on the municipal level. Mayor George B. McClellan received continuous reports from the police officialdom about the decay of moral fiber being wreaked upon the city, particularly the city's youth, by the nickelodeons, 10-cent theaters and other motion picture exhibition centers. A recommen-

¹ Kenneth MacGowan, "Behind the Screen: The History and Techniques of the Motion Picture" (New York: Delacorte Press, 1965), p. 349.

² Garth Jowett, "Film. The Democratic Art" (Boston: Little, Brown & Co., 1976), p. 110.

dation was made to McClellan that perhaps the best manner to handle the situation was to close down the theaters.

The situation boiled for a number of months as the motion picture's popularity continued to skyrocket. Finally, on December 28, 1908, the mayor held a public hearing in an attempt to determine his actions on the motion picture issue. Discussion was heated; clergy from almost every denomination, as well as representatives of the Society for the Suppression of Vice, charged that the motion picture was leading the people astray and that exhibitors and producers were nothing but a money-hungry mob that could care less about the city's morals. Representatives of the motion picture industry denied the charges. In the end, McClellan decided to revoke the exhibitors' licenses, thereby closing the theaters.³

The theaters weren't out of business for long. A restraining order was placed on the mayor's action, and business continued to boom.

McClellan's action was the first and last attempt at total restriction of the motion picture industry. The city's most effective ordinances proved to be those dealing with the physical condition of theaters. Early films were printed on nitrate stock—a highly flammable substance. This, added to the fact that most materials utilized in the theaters' structure lacked flame retardency, strengthened ordinances relating to theater physical conditions. The so-called physical laws turned out to be effective in regulating safety and, on occasion, the showing of "objectionable" films.

Other cities passed censorship laws, including Los Angeles in 1917; Quincy, Ill., in 1913; and Birmingham, Ala., in 1921. Standards and methods of enforcement varied widely. Most municipal efforts at censoring motion pictures failed. As Garth Jowett put it in "Film: The Democratic Art," "City censorship ultimately failed to provide the control demanded by most reform groups and the industry had a legitimate case against the high cost incurred in trying to meet the numerous and often arbitrary local variations in standards."⁴

D. STATE LAWS

If local censorship proved to be ineffective, State censorship proved to be a very effective means to control the medium. In 1911, Pennsylvania became the first State to set up a censor board, followed by Kansas (1914), Maryland (1916), New York, and Virginia (1922). Other States would join or attempt to join the censor board movement. Florida passed one of the more distinctive laws in 1921, authorizing the Governor to appoint three Florida citizens to the National Board of Review (NBR will be discussed later). The law prohibited showing films in the State which had not received Board approval.

Since the State board represented the most effective enforcement system, it was the most frequent legal target of the motion picture industry. One such case, *Mutual Film Corporation v. Ohio*, made it all the way up the judicial ladder to the U.S. Supreme Court. It was at this stage that motion pictures would be dealt a severe blow.

Detroit-based Mutual Film charged the State of Ohio with abridgment of free speech guarantees contained in the Ohio and U.S. Consti-

³ Jowett, p. 111.

⁴ Jowett, p. 118.

tutions. The Court unanimously dismissed the charges and went further by saying that film was not speech but entertainment—on a par with carnival sideshows. Therefore, the motion picture was not entitled to the same guarantees of free speech as newspapers or books. The ruling made the industry more vulnerable to almost any municipality, State or any other government entity that wanted to impress any standards they wished on movies. Indeed, prior censorship had now obtained an aura of judicial approval. The motion picture would live in the shadow of this decision until 1952 when the Court reversed its ruling.

E. FEDERAL REGULATION

As was mentioned earlier, a number of attempts were made by Congress, under pressure from various factions, to establish a Federal censorship system. One of the more notable attempts occurred in 1914 during the 63d Congress. The Honorable Dudley M. Hughes (D-Georgia), chairman of the House Committee on Education, introduced a bill which would have established a Federal motion picture commission within the Bureau of Education. This bill, H.R. 14805, is reprinted below:

[H.R. 14805, Sixty-third Congress, second session.]

A BILL To create a new division of the Bureau of Education to be known as the Federal motion picture commission, and defining its powers and duties

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a Federal motion picture commission be, and the same is hereby, created, to be composed of five commissioners appointed by the President, not more than three of whom shall be of the same political party. The commission shall be a division of the Bureau of Education.

SEC. 2. That each commissioner shall hold office for six years, except that when the commission is first constituted two commissioners shall be appointed for two years, two for four years, and one for six years. Each commissioner shall thereafter be appointed for a full term of six years. Vacancies shall be filled in same manner as the original appointment. The salary of the chairman shall be \$3,500 a year, and of each other commissioner, \$3,000 a year.

SEC. 3. That the commission shall elect a secretary, whose salary shall be \$1,500 per annum. The commission may appoint inspectors and fix the compensation of each, provided that in no case the compensation of an inspector shall be more than \$5 per day exclusive of traveling expenses. Actual and necessary traveling expenses shall be allowed to those who travel on the business of the commission.

SEC. 4. That the commission shall license every film submitted to it and intended for entrance into interstate commerce, unless it finds that such film is obscene, indecent, immoral, or depicts a bull fight or a prize fight, or is of such a character that its exhibition would tend to corrupt the morals of children or adults to incite crime. The commission may license

any film, subject to such excisions, amplifications, or alterations as the commission may direct and require to be made. The commission may, by unanimous vote, withdraw any license at any time for cause shown.

SEC. 5. That the commission shall adopt an appropriate seal, which shall be affixed, in such manner as the commission may direct, to every film approved by it.

SEC. 6. That when any film has been approved the commission shall issue a certificate in the form adopted by the commission. These certificates shall describe the film and shall bear a serial number, and shall state its title, the day upon which it was approved by the commission, and the number of linear feet contained therein.

SEC. 7. That the commission may if it has licensed a film issue a seal and certificate for each duplicate thereof without an examination of such duplicate.

SEC. 8. That no copyright shall be issued for any film which has not previously received the certificate and seal of this commission.

SEC. 9. That no person, firm, or corporation shall carry or transport any film from one State into another State of the United States, or from any foreign country into any State of the United States, unless such film has been licensed by the commission and a true copy of the certificate accompanies it.

SEC. 10. That no moving picture film that has not been licensed by the commission and which does not bear its stamp shall be exhibited in the District of Columbia or any place under the jurisdiction of the United States or in any of the Territories of the United States.

SEC. 11. That a fee of \$3 shall be charged for the examination by the commission of each film of one thousand feet or less. Any change or alteration in any picture on the film after it has been licensed, except the elimination of a part, shall be a violation of this act and shall also void the certificate and seal of such film.

SEC. 12. That the commission shall annually, on or before the first day of January in each year, submit a written report to the United States Commissioner of Education. In this report, and by other means, the commission shall make recommendations to importers and producers of films and to the public regarding the educational and recreational use of motion pictures.

SEC. 13. That the penalty for violation of this act shall be a fine of not more than \$500, or imprisonment not more than one year, or both, in the discretion of the court, and the films unlawfully changed, exhibited, or transported shall be confiscated.

SEC. 14. That this act shall take effect immediately, except sections eight, nine, and ten, which sections shall take effect nine months after date of the approval of this act.

Although the prospect of a Federal censorship system was threatening to the industry, it was an idea that did not get much further than the concept stage.

The Federal Government was not out of the picture altogether; however, the Secretary of the Treasury, through the Bureau of Customs, was empowered to examine imported films. There were also a number of separate statutes concerning such things as obscene or pornographic films, prizefight films, and distribution of films to military.

The most centralized censor systems still existed on the municipal level and, much more effectively, on the State level.

F. THE INDUSTRY REACTS

Feeling the increasing crush of pressure against it, the industry began its efforts to placate the critics.

In March of 1909, the National Board of Censorship of Motion Pictures was established as a cooperative effort between the Motion Picture Patents Co. and the People's Institute of New York. Initially, the board took in films that were to be exhibited in New York and on a fee per film basis reviewed and evaluated the contents of films prior to public showings. If the board felt changes should be made, they made their recommendations to the production company responsible, which would have the option of accepting the board's recommendation or not. NBCMP had no legal authority to enforce its recommendations. Three months after its formation, at the industry's urging, NBCMP expanded its activities from New York to the entire Nation. The massive increase in responsibility initiated the board's use of a number of volunteers in various sections of the country to help in the review process.

In 1915, the board's name was shortened to National Board of Review. Between 1915 and 1922, the board continued to be a major force in the motion picture industry. In addition to its review function, it made efforts to raise the level of the public's taste for movies, thereby encouraging the industry to produce higher quality products.

Try as it might, NBR never gained the confidence of individuals and groups that were attacking the industry. During hearings on H.R. 14805, mistrust of NBR's ability to control the industry was expressed by prominent motion picture decency advocate Rev. Wilbur F. Crafts: "There is an unofficial board of censors in New York, but they have no authority to compel film manufacturers to submit any pictures unless they choose to do so. Therefore, the worst pictures are not sent there, and, furthermore, they have no adequate funds to do the work, and the State and local boards have turned down a great many of the pictures which they have passed. The country in general is not satisfied with this unofficial nominal board."⁵

G. ENTER WILL HAYS

The motion picture industry suffered from a massive case of bad image during those early years, particularly during the late teens and early twenties.

Motion picture content was not the only point of contention. During the industry's formative years, a number of people made for-

⁵ Hearings, Committee on Education, U.S. House of Representatives (63d Congress) on bills to establish a Federal Motion Picture Commission (Government Printing Office, 1914). p. 5.

tunes "overnight." The public became fascinated with and envious of the success and lifestyles of the "stars" to the point of placing them on pedestals. When one or more of these idols tumbled from grace, the public's sense of outrage was tremendous. Scandalous behavior reported on and magnified by a sensation-seeking press added fuel to the fire of the already vocal opposition forces attempting to control the industry through the Government.

On December 8, 1921, industry chieftains Lewis J. Selznick and Saul Rogers met with Postmaster General William Harrison Hays at the Wardman Park Hotel in Washington, D.C. Acting as representatives for the industry, they offered Hays the post of industry leader at \$100,000 per year. The meeting turned out to be step one in the formation of the Motion Picture Association of America's paternal organization, Motion Picture Producers and Distributors of America.

Will Hays was, in a term that would become popular much later in the 20th century, a "middle American." Born and raised in Indiana, Hays was a successful attorney, a staunch member of the Presbyterian Church and an active Republican. Beginning as a precinct committeeman in Sullivan County, he continued up the political ladder until February 1918, when he attained the chairmanship of the Republican National Committee. It was from this post that Hays engineered the successful Presidential bid of Warren G. Harding.

During the election, Hays first came to the industry's attention. As part of his campaign activities, Hays had gone to the industry to assure candidate Harding's favorable image on the screen. He accorded newsreels the same preferential treatment that the rest of the press received. He also met with a number of industry heads and formed several close friendships. After Harding's victory in 1920, Hays reportedly received an offer to work in the industry, but the offer was declined.

Hays considered the December 8 offer over Christmas and on January 14, 1922, accepted. On March 5, he signed his first contract with the industry, and the Motion Picture Producers & Distributors of America became reality.

There had been another industry organization, the National Association of the Motion Picture Industry. It had proven ineffective in dealing with the industry's censorship problems, and with the rise of MPPDA, NAMPI dissolved.

II. MPPDA IN ACTION

From the beginning, Hays used his ability as a politician, honed by countless campaigns, to win public confidence as well as keep the industry in line. It was his feeling that governmental regulation, whatever the form or level of government, was intolerable and un-American. The answer was self-regulation. Now that he had the answer, he needed to convince the industry to adopt a system. There was also the question of public acceptance of such a system and, most immediately, how to stop the juggernaut of State and local regulation that was continuing to sweep the country.

The juggernaut and Hays met head to head in the State of Massachusetts. During 1922, censorship bills were under consideration by 32 States. Massachusetts became the first State in which a censorship law would stand or fall in a referendum. Knowing that a clear rejection

of governmental regulation by popular vote would be a strong psychological weapon in his arsenal, campaigner Hays took on the task with no less zeal than the "Harding for President" campaign.

When the final results were compiled, Hays had his victory. The vote was 563,173 to 208,252. Hays' tactics were questioned, but not the effect of the victory. The juggernaut had been halted—no State laws were enacted after the election. Hays continued to make speeches, write articles, and turn out press releases extolling the virtues of the American motion picture industry and the fact that improvements were being made and would continue to be made without the interference of Government.

The MPPDA under Hays made a number of efforts to defuse public demands for movie regulation, but the public grew louder and more organized in its attacks. Now, instead of a scattered group of organizations (the studios), there was a central target—MPPDA and Will Hays. While he was busy putting out fires on the public side, Hays began developing a self-regulatory system for the industry.

I. SELF-REGULATION: FORMULA TO PRODUCTION CODE

Much of the material being used for the screen began as books or plays. Much of this material, particularly in the "Jazz Era," was very explicit. At Hays' urging, the MPPDA adopted a system whereby the studios would send a summary to MPPDA of any books or plays which were projected as future projects, along with notations on any possible problems. MPPDA in turn would make recommendations as to material sensitivity and its acceptability.

The formula did not deal with original screenplays and it had no force behind it except Hays' insistence that circumventing it would be a violation of MPPDA's articles of incorporation. Because of its inherent weaknesses, the formula ultimately failed. It was, however, the first step toward a practical system of self-regulation.

The next major step after the formula was establishment of a studio relations department. The department was headed by Col. Jason Joy. While serving as the association's public relations director, Joy had accumulated a great deal of knowledge on the subject of what pressure groups found objectionable about motion pictures. He attempted to transmit these objections directly to the producers from his base of operations in Hollywood. As was the case in the "formula," studios were urged to submit material to MPPDA (Joy and staff) to determine possible objections. Eventually Joy expanded his activities to viewing films prior to release and suggesting changes at that level. Producers began to discover the wisdom of the system as their films made in accordance with or otherwise adjusted to MPPDA standards got through the censorship process with fewer cuts.

Until 1927, studio relations had no formal guidelines to work with. In that year, it got them: a list of 11 items that would under no circumstances be included in a film made by an MPPDA member and 26 items which would be handled with extreme care. The studio relations department and the "don'ts and be carefals" were advancements over the "formula," and self-regulation was accepted in various degrees by a few studios. One of Hays's chief confederates in gaining industry cooperation was technology—more specifically, sound. While cutting a

silent movie was bothersome and could become expensive, making changes in sound movies was very difficult and the process could require expensive redubbing and/or retakes.

Generally, however, the industry was in no mood for moral reform. One of the primary blocks to self-regulation was the industry leaders' desire for freedom from censorship, and their willingness to finance a very expensive trade organization to work toward that end. The same individuals were locked in combat for entertainment dollars (or nickels) and were not about to give each other the edge.

Testifying before the subcommittee on March 24, 1977, Motion Picture Association of America president Jack Valenti spoke about this problem:

Contrary to the popular notion, the major companies are not embracing each other with warm affection. They are operating competitively in the marketplace with machetes and knives and gunning for each other.

So it was in Will Hays' day.

The "don'ts and be carefals" turned out to be yet another failed step toward self-regulation. They were vague enough to be skirted and, like the "formula," had no force behind them.

1930 Production Code

Motion picture producers recognize the high trust and confidence which have been placed in them by the people of the world and which have made motion pictures a universal form of entertainment.

They recognize their responsibility to the public because of this trust and because entertainment and art are important influences in the life of a nation.

Hence, though regarding motion pictures primarily as entertainment without any explicit purpose of teaching or propaganda, they know that the motion picture within its own field of entertainment may be directly responsible for spiritual or moral progress, for higher types of social life, and for much correct thinking.

During the rapid transition from silent to talking pictures they realized the necessity and the opportunity of subscribing to a code to govern the production of talking pictures and of reacknowledging this responsibility.

On their part, they ask from the public and from public leaders a sympathetic understanding of their purposes and problems and a spirit of cooperation that will allow them the freedom and opportunity necessary to bring the motion picture to a still higher level of wholesome entertainment for all the people.

Thus began the Production Code, a document which, with modifications, would be the blueprint for motion picture industry self-regulation for nearly four decades.

The code was written by Martin Quigley, publisher of the Motion Picture Herald, and Father Daniel A. Lord, S.J., a Catholic priest based in California who had been a technical advisor on films. The document was prepared with the full cooperation and encouragement

of Hays. Its acceptance by MPPDA became official on March 31, 1930.

The code differed from "formula" and "don'ts and be carefults" guidelines in that it included with the production guidelines an explanatory section called "the reasons." "The reasons" gave philosophical, moral reasons behind the code. The code with "the reasons" was not openly circulated until 1934 when the Catholic Legion of Decency had been in action—more on the Legion of Decency later. Jowlett postulated that Hays kept the two separated because of pressure he was receiving concerning what some felt was undue Catholic influence on the MPPDA.

In the early years of its existence, the code operated in much the same manner as its ill-fated predecessors. It began as a voluntary system whereby the studios could submit scripts to studio relations if they wished. The system took a tentative step toward becoming truly regulatory when in October of 1931 script submission was made compulsory. Code or no code, the industry still was not motivated to submit to heavy self-control. In 1934, that situation changed.

Legion of Decency

Hays had made some strides in lowering the heat on the censorship front. The Massachusetts win, his speechmaking, the involvement of influential groups and individuals with the MPPDA—all were calculated efforts to bar the censorship wolf from the industry's door. While the heat was far from gone, the industry felt about as secure as it could that efforts toward tighter Government control, Federal control in particular, were being held at bay.

In a way, by easing the heat on them, Hays removed one of the motivating factors pushing the industry toward self-regulation. When the threat of Government censorship lessened, so did the industry's desire for self-regulation.

In his statement before the subcommittee on June 15, 1977, Rev. Patrick J. Sullivan, S.J., the director of the Office for Film and Broadcasting of the U.S. Catholic Conference, said that "For more than 40 years the Catholic Church in the United States has favored and supported the principle of voluntary self-regulation by the motion picture industry over and against government controls and censorship."

The Legion of Decency was the institutionalization of the Catholic position. Formed as an Episcopal Committee on Motion Pictures during the 1933 American Bishop's Convention in Los Angeles, it was charged with the responsibility of forming a pressure group and directing the pressure toward the industry to live up to the guidelines of its production code. The legion carried out its tasks on several fronts, including:

Making up pledges which were distributed by bishops to priests and finally to individual members. The pledges stated that the undersigned promised "... to remain away from all motion pictures except those which do not offend decency and Christian morality" and concluded "I make this protest in a spirit of self-respect, and with the conviction that the American public does not demand filthy pictures, but clean entertainment and educational features."

Putting pressure on exhibitors to show acceptable features through organized demonstrations, letters and visits by protesting delegations.⁶

The legion was vaulted into national prominence when the theaters of Philadelphia were boycotted by Catholics in June 1934. Although questions were raised in some quarters about the Catholic Church having such an all-pervasive influence on the motion picture industry, the legion's effectiveness was undeniable. Economics was a universally understood language, and the Catholic Church had the organization to put a great deal of economic pressure on the industry.

Production Code Administration

In July 1934, the MPPDA established the Production Code Administration, which would, as its name indicated, administer the code. MPPDA members were now required to submit all films to the PCA prior to release and obtain a seal. The penalty for noncompliance was \$25,000. Most major theaters were owned by studios—MPPDA members—a factor that increased the PCA's effectiveness—and would help its downfall when the studios were ordered to divest themselves of the theaters in 1948.

Nearly five decades after Edison's box-like creations began grinding out motion pictures, the industry those boxes begat now had its own regulatory system. While the existence of the PCA did not stop other censor bodies from functioning, its birth marked the beginning of a lessening of the influence they had held over the movies for over a quarter century.

The legion, which had begun as a temporary organization, was made a permanent fixture. In 1936, it began a rating system for films which used a series of letters and numbers as descriptive guidelines for movie attendees. Catholic involvement in motion pictures has continued. The current organizational involvement is represented by the U.S. Catholic Conference Office of Film and Broadcasting.

PCA: 1934-68

During its existence, the Production Code Administration became deeply entrenched in the motion picture business on every level. Any material that was to be translated into film, be it book, play or script, was submitted and analyzed for any problems or violations of the code. This allowed studios to make changes at the relatively inexpensive prefilm stage rather than having to edit and perhaps reshoot footage to make changes in the finished product.

The idea that movies could be produced that would be universally accepted from coast to coast was dependent on one principle—the motion picture, with the possible exception of radio, newspapers and records, was alone in the mass entertainment field. Without competition, the industry flourished, producing movies with this artificially imposed sameness carefully keeping the motion picture contained (although numerous methods were used to skirt the Code). The combination of advancing technology and social upheavals radically altered the lifestyles and attitudes of the American people. The motion picture industry—producing films under the old production code—began falling out of step with current realities.

⁶ Paul W. Facey, *The Legion of Decency* (New York: Arno Press, 1974), p. 54.

Television, which was a mere experiment prior to World War II, became a very potent rival to movies. The booming post-war economy provided Americans with more freedom to travel or experience other leisure time activities. In short, the motion picture was not alone in the mass entertainment field any more. As if the industry didn't have enough problems on this side of the Atlantic, European filmmakers began invading American theaters with their films, which tended to be much more sexually explicit than their American counterparts.

The code was modified and the PCA became more flexible in enforcement. Gradually, however, it became evident that imposing one set of sanctions for every film simply was not going to work any more.

November 1968 saw the beginning of the current system of self-regulation—the rating system. This system will be discussed in detail in the chapters that follow.

J. CONCLUSION

Compressing over a half-century of history into a few pages tends to give one the impression that events occur and modifications are made in rapid sequence. Changes in motion picture regulation and self-regulation from beginning to the present were very slow—evolutionary as opposed to revolutionary.

The rating system has been in operation for less than a decade and has already undergone a number of changes. How long will the current system last? Could anyone have predicted the longevity of the code and Production Code Administration back in 1934? Will there be more or less control? There are no crystal balls—it is a question that will continue to be answered as long as the motion picture exists.

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IV. SUBCOMMITTEE HEARINGS

A. MARCH 24, 1977, IN WASHINGTON, D.C.

Mr. Jack Valenti, president of the Motion Picture Association of America, appeared before the subcommittee on March 24. Since the hearing was intended to be an information-gathering session for the subcommittee, the witness had been asked to explain the movie rating system, including the appeals process.

Jack Valenti, formerly Special Assistant to President Lyndon B. Johnson, left the White House in May of 1966 to become the president of MPAA. In April of 1968, the U.S. Supreme Court upheld the constitutional power of the States and cities and towns to prevent the exposure of children to books and films which could not be denied to adults. As a result, on November 1, 1968, a voluntary film rating system for the motion picture industry was put into effect.

Mr. Valenti discussed the purpose and technical aspects of the system in oral testimony and also in a detailed prepared statement:

From the outset, the purpose of the rating system was to provide advance information to enable parents to make judgments on movies they wanted their children to see or not to see. Basic to the program was and is the responsibility of the parent to make the decision.

The rating board does not rate for quality or the lack of it. That role is left to the movie critic and the audience. We would have destroyed the rating program in its infancy if we had become arbiters of how good or how bad creatively a movie was.

The only objective of the ratings is to advise the parent in advance so he may determine the possible suitability or unsuitability of viewing by his children. But, to repeat, the rating would not even make a final judgment on that; except for the X rating, the parent's decision remained the key to children's attendance.

Inherent in the rating system is the fact that to those 17 and over, and/or married without children, the ratings have little if any meaning.

The rating board's criteria are four: Theme, language, nudity and sex, and violence; and part of the rating comes from the assessment of how each of these elements is treated in each individual film.

There is no special emphasis on any of the elements. All are considered and all are examined before a rating is given.

Contrary to popular but uninformed notions, violence has from the outset been a key factor in ratings. (Many violent films have been given X ratings, but most of the directors have chosen, on their own, to revise the extremely violent sequences in order to receive an R rating.)

How is a rating arrived at?

The ratings are decided by a rating board located in Hollywood. It is a full-time board, composed of seven persons, headed by a chairman. There are no special qualifications for board membership, except one must love movies, must possess an intelligent maturity of judgment, and have the capacity to put himself or herself in the role of most parents and view a film as most parents might—parents trying to decide whether their younger children ought to see a specific film.

In my role as MPAA president, I do not take part in rating discussions, do not interfere in rating decisions, and do not overrule or dissuade the board or its chairman from any decisions they make.

In the near-decade of the rating system's existence, its critics have been vocal about many things, but no one has yet accused the board of deliberately fudging a decision or bowing to pressure or doing anything that would be inconsistent with its integrity. And that is no insubstantial asset.

No one is forced to submit a film to the Board for rating, but I would judge some 99 percent of the producers creating entertaining, seriously intended, responsible films (not hardcore pornography) do in fact submit their films for ratings. Most makers of pornographic movies do not submit their films but instead, within the rules of the rating system, self-apply an X rating and go to market. The other symbols, G, PG, and R, are registered with the U.S. Patent and Trademark Office as certification marks of the MPAA and cannot be used in advertising by any company which has not officially submitted its film for rating. They may not be self-applied.

NATO estimates that about 85 percent of the exhibitors in the Nation participate in the rating program and enforce its admission restrictions.

The board views each film and after group discussion votes on the rating. Each board member completes a rating form spelling out his or her reason for the rating in each of the four categories of theme, violence, language, and nudity and sex, and then gives the film an overall rating based on the category assessments.

The rating is decided by majority vote.

The producer of a film has a right under the rules to inquire as to the "why" of the rating.

The producer also has the right, based on the reasons for his rating, to edit his film if he chooses to try for a less severe rating. The reedited film is brought back to the rating board, and the process of rating goes forward again.

How is a rating appealed?

Should the producer for any reason be displeased with the rating he can appeal the decision to the rating appeals board, which sits as the final arbiter of ratings.

The appeals board comprises 22 members, men and women from MPAA, NATO, and IFIDA.

They gather as a quasi-judicial body to view the film and hear the appeal. After the screening, the producer whose film is being appealed explains why he believes the rating was wrongly decided. The chairman of the rating board states the reason for the film's rating. The producer has an opportunity for rebuttal. In addition, the producer, if he desires, may submit a written presentation to the board prior to the oral hearing.

After appeals board members question the two opposing representatives they are excused from the room. The board discusses the appeal and then takes a secret ballot. It requires a two-thirds vote of those present to overturn a rating board decision.

By this method of appeal, controversial decisions of the rating board can be examined and any rating deemed a mistake set right.

From November 1, 1968, through March 8, 1977, the appeals board heard 84 appeals. The board upheld 56 ratings, changed 25, and 3 cases were not decided.

The decision of the appeals board is final and cannot be appealed, although the appeals board has the authority to grant a rehearing on the request of the producer.

The subcommittee also was told that a representative of a religious organization is always invited to be present as a monitor. (Interestingly enough, film advertising trailers are also monitored. The reason for this is so that parents will know that children attending a G or a PG picture will not be exposed to an unedited R or X promotion.)

What do the various ratings mean?

Because the ratings are subjective in nature, neither formularized nor immutable in equation, there is bound to be some disagreement with some ratings. And there is.

Essentially the ratings mean the following:

G. "General Audiences—All ages admitted."

This is a film which contains in theme, language, nudity and sex, or violence which would, in the view of the rating board, be offensive to parents whose younger children view the film. The G rating is not a certificate of approval, nor does it signify a children's film. Some profoundly significant films are rated G, for example, "A Man for All Seasons."

Some snippets of language may go beyond polite conversation but they are common everyday expressions. No words with sexual connotations are present in G-rated films. The violence is at a minimum. Nudity and sex scenes are not present.

PG. "Parental Guidance Suggested; some material may not be suitable for children." This is a film which needs to be examined or inquired about by parents before they let their younger children attend. The label PG plainly states that parents may consider some material unsuitable for their children, but the parent must make this decision.

Parents are warned against sending their children, unseen without inquiry, to PG-rated movies.

There may be profanity in these films, but certain words with strong sexual meanings will vault a PG rating in the R category. There may be violence but it is not deemed excessive by the rating board. Cumulative man-to-man violence or on-the-screen dismemberment may take a film into the R category.

There is no explicit sex on the screen, although there may be some indication of sensuality. Fleeting nudity may appear in PG-rated films, but anything beyond that puts the film into R.

The PG rating, suggesting parental guidance, is thus an alert for special examination of a film by parents before deciding on its viewing by children.

Parents are warned against sending their children, unseen without inquiry, to PG-rated movies.

Obviously the line is difficult to draw and the PG-rated film is the category most susceptible to criticism. In our plural society it is not easy to make subjective judgments for more than 200 million persons without some disagreement. So long as the parent knows he must exercise his parental responsibility, the PG rating serves as a meaningful guide and as a warning.

R. "Restricted, under 17's require accompanying parents or guardian."

This is an adult film in some of its aspects and treatment of language, violence, or nudity and sex. The parent is advised in advance it contains adult material and he takes his children with him with this advisory clearly in mind.

The language may be rough, the violence may be hard, and while explicit intercourse is not to be found in R-rated films, nudity and lovemaking may be depicted in the film.

Therefore, the R rating is explicit in its advance advisory to parents as to the adult content of the film.

X. "No one under 17 admitted." This is patently an adult film and no children are allowed to attend. It should be noted, however, that X does not necessarily mean obscene or pornographic. Serious films by lauded and skilled filmmakers may be rated X. The rating board does not attempt to mark films as obscene or pornographic; that is for the courts to decide legally. The reason for not admitting children to X-rated films can relate to the accumulation of brutal or sexually connected language, or of explicit sex or excessive and sadistic violence.

To oversee the rating board, the film industry has set up a policy review committee of officials of MPAA, NATO, and IFIDA. These men and women gather quarterly to monitor past ratings, to set guidelines for the rating board to follow, and to make certain that the rating board carries them out reasonably and appropriately.

Because the rating program is a self-regulatory apparatus of the film industry, it is important that no single element of the industry take on the authority of a "czar" beyond any discipline or self-restraint.

Due to the subjective nature of such a process, what about the argument that the rating given a film may be in error? Mr. Valenti addressed this point:

Do we make errors? Of course we do. I think we probably have erred, because the people who operate the rating board are human beings, and we are dealing with a tormentingly difficult situation of making subjective judgments where the criteria are at best fuzzy, and sometimes obscure. The lines are dimly marked. The alleyways we walk through are very poorly illuminated. The people who serve on the board love films, they are intelligent people, but they are neither gods, nor fools, and they make errors.

Not, however, as many as you might suspect. Mr. Louis Nizer, MPAA's general counsel, pointed something out to me the other day that is illuminating. "Do you realize," he said, "that the Supreme Court of the United States has reversed itself, admitting error, probably more often than the rating board has made errors." In the past 8½ years the board has rated 4,108 films, and out of that number, only a handful, maybe two dozen, have created what I would call substantial criticism, where people say, "That is an outrage, how could you have missed that one."

So, sure, we make errors, but we rate a lot of films. We rated 486 films last year. So we are bound to make errors, but on whatever errors we make we have critics. The major directors raise hell with us. The independents think the main dominate the ratings and they give us a bad time. The conservatives think we are too liberal, and the liberals think we are too conservative.

The greatest argument among ratings' critics is, of course, centered on the R and PG categories. Valenti related how some producers try for a less severe rating to widen their market. According to Jack Valenti:

If you make a picture that many people want to see, no rating is going to hurt you. If you make a picture that few people want to see, no rating is going to help you.

Mr. Corman asked about the financing of the rating system. Mr. Valenti responded that it was self-supporting. A fee system has been set up based on the cost of the film negative. The more a picture costs, the more the fee (see appendix 1 for the list of fees). Of the films submitted each year, about 30 percent of the features are from the major studios, yet they generate about 60 percent of the total fees.

A question was raised concerning the present makeup of the board. Most of the members come from the California area, although the chairman is from the east coast (see appendix 2 for the code's membership and biographies). Since members must be available for daily screenings (except the chairman), they must reside in the Los Angeles area. No rating board member has been hired who previously worked for an MPAA company. Two current members were a part of the old production code operation which was dismantled when the new system took effect.

Mr. Valenti was asked his assessment of the U.S. Catholic Film Conference rating system. He expressed no objection to the church examining films and giving information. In fact, he consults with them frequently in trying to develop a consensus on the ratings. However, he does comment that :

... I do not subscribe to some of the things they say, because it is funded by and founded on church dogma and canon law, rather than on the current mores of society.

There is one specific rule that will guarantee a certain rating. The use of a certain four-letter word will vault a PG film into the R category automatically. The only way the film can get a PG rating is on appeal. Six films have gained a PG on appeal in this circumstance, the most notable being "All the President's Men."

At the conclusion of the hearing, Mr. Valenti was asked how the MPAA insured that exhibitors enforced the ratings. Mr. Valenti answered that he had no enforcement authority, but that the MPAA worked closely with the National Association of Theatre Owners, and that they were doing a good job. It is estimated about 85 percent of the Nation's theaters participate in the rating system.

Due to time constraints, some questions could not be asked. Mr. Valenti later responded to them by letter. Pertinent questions and answers follow :

Is there an additional charge when a rating is appealed?

The appealing producer/or/company must pay \$100 for rental of the screening room in which the Appeals Board views the appealed film.

Is there a limit on the number of times a film may be edited and resubmitted for a new rating?

There is no limit on the number of times a film may be edited and resubmitted to the Rating Board provided the established exhibition withdrawal periods are observed. No extra fee charged.

Would you have any objection to Subcommittee members and/or staff attending a Board screening or an Appeals Board hearing?

We do not allow anyone to sit in on meetings and discussions of the Rating Board. These discussions are confidential, mainly because the Board members discuss the film in detail and should some of their observations be made public it could cause serious problems with the producer of the picture. Therefore we have declined the requests of official and journalistic groups to sit in on these meetings (we have declined over 60 such requests over the past two years).

We have always held the view that since Appeals Board meetings are part of a private, industry-wide self-regulatory enterprise, government agencies, State or Federal, ought not play any role, even an observing one. However, we do allow representatives of the film offices of the Catholic and Protestant organizations to sit in the Appeals Board meetings as observers. Therefore, if you wanted to have one or two members of the Committee sit in as observers on one or two Appeals Board meetings, we would have no objection.

What action would be taken by you if you received evidence of the following:

- a. A film was rated by only one or two Board members.
- b. Personnel other than Board members or MPAA employees were allowed to sit in and consult on a rating screening.
- c. A Board member, on his or her own initiative, advised a producer to appeal his or her rating.

It is no violation of the rules of the Rating Board if two members view a film and rate it. That happens but rarely, but in the case of a film that is clearly in a specific category, and absolutely no controversy about its insertion in that category, no rule would be broken.

With the exceptions that I shall outline below, our general procedure now is to have each film screened by all available Rating Board members. Of course, illness and vacation schedules frequently mean that less than the full membership will see any one film. The Chairman of the Rating Board does not see every film. He does see all those that create any kind of controversy or close disagreement within the Rating Board. Therefore the working complement of daily screeners consists of six Rating Board members. Of the 486 films certified in 1976, 37 percent (180) were screened by each of six Rating Board members, another 37 percent (181) by five of six members of the Rating Board, and 14 percent (68) by four of six members of the Rating Board. In other words, 74 percent (361) of all the films that we rated in 1976 were screened by no fewer than five of six Board members; approximately 88 percent (429) by no fewer than four of the six.

By and large, ratings that have involved fewer Rating Board members have had to do with emergency situations when the full Rating Board has agreed to permit fewer members to screen and to classify a film where there is no disagreement at all between these members, and where their rating does not represent any reversal of or deviation from the general principles and patterns of classification that guide the entire Board. In these special situations the Rating Board will permit no fewer than two members, if they are in agreement, to act as surrogates for the entire Board. On July 30, 1974, for instance, two Rating Board members were authorized (because of an emergency situation requested by Levitt-Pickman, an independent film distributor) to screen *LADIES AND GENTLEMEN*, *THE ROLLING STONES*. These two Board members agreed on the rating and it was issued.

In emergencies or rarely invoked problem periods, the rating board will try to accommodate the needs of the producer in getting a rating when (a) his final print will not be completed until the eve of his opening, (b) when other crisis-emergencies occur. But unless there is absolutely no controversy about the rating, the final rating, no matter the emergency, will be referred to the entire Board for final decision. One such emergency case concerned *ROLLERBALL*. There, the two members who viewed the film did *not* agree and the film was screened by the entire board.

There are also times when formerly self-applied X pictures are submitted to us with the assurance that they are designed for a CARA X rating. (Under the rules of the rating program, an X rating can be self-applied. Sometimes distributors of self-applied X ratings want to also have the Rating Board view the film and give it an X rating.)

No one, except representatives of the American Humane Association who sit in on screenings of films containing animal scenes, is allowed to sit in on a rating screening. Even the AHA representative leaves the room after the screening and has no part in the Rating Board discussion of the film that follows.

The right of appeal by any producer is not a secret. While I would not recommend that the Rating Board members specifically remind producers of their right to appeal, I can understand how, in a conversation with a producer who is riled over the rating applied to his picture, a Rating Board member might say "Of course, you have the right to appeal, and if you are not happy with this rating, you always have recourse to the appeals board." I find that an appropriate statement.

What would happen if a parent sought to take a child into an X-rated film? What is the legal basis for an exhibitor's refusal?

Since NATO (National Association of Theatre Owners) is a co-partner in the rating program, the vast majority of exhibitors in the country have voluntarily agreed to abide by the rating program and would therefore not admit a child to an X-rated film even if accompanied by a parent.

The exhibitor's right to refuse admission has been judicially determined by a Minnesota court in an unreported case, *Silberman v. Mann Theaters*, where a parent sued an exhibitor for refusing admission to a 14-year-old to view the X-rated film *MIDNIGHT COWBOY*. (See also: *Tropic Film Corp. v. Paramount Pictures Corp.*, 319 F. Supp. 1247 (1970).)

In addition, in 47 states there are statutes which would subject an exhibitor to criminal sanctions if he admits a minor to a motion picture which is "harmful to" or "obscene for" minors. The majority of these minors statutes are patterned after the New York statute upheld by the United States Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968).

Although an X-rated motion picture is not necessarily either obscene for minors or harmful to children, most exhibitors use the X rating as a guide to whether admission of a minor to a motion picture would be in violation of the statute. This is true even in those 24 states where the statute expressly exempts an exhibitor from liability if the child is accompanied by an adult.

Is a producer given anything in writing by the rating board or the appeals board which explains why a certain rating was given?

When a picture is appealed, the custom has been that the chairman of the Rating Board sends to the appellant (with copies to the appeals board) an explanation for the rating being appealed.

Are you aware of any studios which use contracts that contain a clause forcing a producer to deliver a film with a certain rating?

We know nothing from our specific knowledge that contracts are drawn insisting on specific ratings, but I am told that such contracts do exist. However, whatever contractual relationships a producer has is of no consequence in the rating of his film, any more than the Rating Board accepts a plea of "economics" as a warranted defense against a specific rating.

Does the Board ever "review" a script and suggest changes before a film is even submitted for a rating?

In July 1975, Stephen Farber wrote an article for the *Los Angeles Times* in which he seemed to claim that the Rating Board demands or requires or wants to have scripts submitted to it before production. This indeed was the procedure under the old production code, and in the early days of the rating program.

The Rating Board does not solicit scripts; it does *not* want them. However, when a writer, producer, or studio insists that fairness dictates that the Rating Board look at a script to indicate where its classification concerns may apply, it will reluctantly do so. But the Board will *never* "suggest changes" either before *or* after a film is submitted. This fact of film classification must be appreciated if the whole process is to be understood. Indeed, the Rating Board has devised a "script letter" for those comparatively few scripts that are sent to it, in which the Board states as specifically as possible that it is totally *impossible* to classify a film in terms of anything other than the finished production itself.

As noted in a reply to Mr. Farber's 1975 printed assumption that we solicit scripts, in the 2 years before 1974; 22.1 percent of the films we classified had originally been sent to us in script form with the request that we comment on them in potential classification terms. During the next 18 months, we had reduced this percentage to 4.2 percent.

What would the MPAA's response be to the following proposal: All producers and exhibitors would be given the reason for the designated rating in writing. If this happened, then a parent could simply go to the theater and be given in writing the reasons for a movie's rating.

Over the past several years we have examined dozens of suggestions to improve the rating system. We have discarded most of these ideas since the confusion they create are far more tangled than the cures they claim to offer.

I have established from the very outset of the rating program that we never rated a film on its quality or lack of it, its cinematic value or lack of it, but only on content that would be of interest to parents. And finally, the root of the

rating system springs from parental responsibility—unless the parent really cares, and tries to find out more about films—from neighbors who have seen it, from reviews in newspapers, and on television, from magazines (like *Parents* magazine) or the bulletins put out by the Catholic and Protestant film councils, then no rating system, no government agency, no appointed commission will do the job. We cannot expect a rating system to do what parents neglect to do.

B. APRIL 14, 1977, IN LOS ANGELES, CALIF.

After widely publicizing the subject matter of the hearings so that all interested parties might comment, the subcommittee held a hearing in Los Angeles in April to listen to representatives from various segments of the motion picture industry.

1. *Witness Corwin*

Sherrill C. Corwin is past president of the National Association of Theatre Owners and chairman of the board of Metropolitan Theatres Corp. of Los Angeles. He appeared to offer his views as an exhibitor, a member of the NATO code and rating committee, a member of the appeals board, and a fledgling producer.

In his opinion, the present rating system has worked. It has provided checks and balances and information for the majority of the motion picture audience. From his experience, Corwin noted that major producers get as many appeals rejected as independents. No amount of pressure has altered board opinions.

Corwin went on to say:

If there is one area exhibitors throughout America feel should be changed it is in connection with those pictures rated PG that might be considered too adult or permissive for subteens; namely, the age group between 6 and 12; while those teenagers, 13 to 17, are adequately mature to handle the subject matter.

This is a matter currently being discussed by the NATO executive board and since our position is a little better defined, it is our hope that we can sit down with the Motion Picture Association and work out this nettlesome problem.

And, finally, no rating, in my opinion, other than an X, has affected the box office of the film if the public wants to see it; nor have we seen the change of a rating symbol on any film affect its box office potential.

To paraphrase Gertrude Stein, "A hit is a hit is a hit," and once our children are protected, let the box office chips fall where they may.

In discussing independent membership on the appeals board, Corwin noted that the IFIDA (International Film Importers and Distributors of America) group has disintegrated somewhat over the last 10 years. As a result, there are not many board members available and many do not appear. Some effort appears to be underway to reactivate the group.

Corwin noted the difficulty in attending appeals sessions

You see, counsel, they're held in New York, as I pointed out, and we're given about 3 days' notice. It's pretty hard to put your calendar in shape and fly for 3,000 miles for an appeal, and then get back and attempt to get any work done.

He also addressed the fact that his opinion on one matter differed somewhat from the major studios.

Mr. LYNCH. Mr. Corwin, would it be fair for me to say that the major studios do not agree with your statement, that the rating isn't really going to affect the box office?

Let's use your own example: Why would Paramount Pictures go through several appeals and much editing, if it wasn't going to make a difference at the box office, between a PG and an R rating?

Mr. CORWIN. Undoubtedly, they disagree with me. Perhaps it isn't as easy to pinpoint or to prove my position. It's just that it's kind of a seat-of-the-pants reaction that you get after being an exhibitor for 30 or 40 years and looking at figures that long.

2. *Witness Selig*

Robert W. Selig is vice president of the National Association of Theatre Owners (NATO) and chairman of NATO of California, as well as executive to the president of Pacific Theatres. Speaking as an exhibitor, Mr. Selig basically agreed with what Mr. Corwin had told the subcommittee:

It should be understood that the industry's code and rating system is not a self-styled, self-imposed form of censorship, or any commercial attempt to persuade or dissuade movie going by mature adults.

We believe we owe the parents some form of simple, widely understood identification of film content which they will trust and apply in adjudging which movies their children may or may not see.

As for possible discrimination in the rating system against independents, Mr. Selig knew of none. In anticipation of his appearance before the subcommittee, he consulted with theater owners throughout California, and no one had heard of any such discrimination.

The question of advertising trailers was also discussed:

The staff has heard complaints that sometimes at a G-rated movie, trailers are run for R- or X-rated films, and sometimes a G or PG movie might have an X-rated trailer.

Could you explain something about trailers; that is, how you decide what trailers will be run for what movies?

Mr. SELIG. Speaking personally, and for our own company, we make it a practice—on the showing of any G-rated picture—we show no trailers, unless it's a G picture. We do not wish to risk offending or imposing ourselves on this audience with a trailer, albeit, tagged—as I will demonstrate in a moment, by information and guidance.

The deletion of scenes and copy only on an R, or even a PG in some cases, during the showing of a G-rated picture

is not enough. We simply do not show any trailers. We do that much to our own economic disadvantage.

However, it so happens that at a meeting, day before yesterday, on Tuesday, of NATO of California, we had prevailed upon the Motion Picture Association code for advertising to provide us with the latest updating of this constant and continuing effort to enforce the ratings insofar as parents are concerned; to make them understanding to parents, and particularly the audiences in the theaters.

Chairman Russo asked the witness why a printout could not be handed out to parents at theaters explaining why a movie had gotten a certain rating.

We have no control, as exhibitors, over what the display advertising may or may not state on behalf of a given picture. But I believe, at least in California, we are now claiming that at least 85 percent of the theaters do carry the symbols, even in the directories, of what the film is rated.

A very larger percentage of the newspapers are cooperating in the elaboration of those symbols by a box that's carried three times a week in some, and 7 days a week in others.

Your suggestion, however, may be a good one. We'd be very glad to give it consideration.

Mr. Russo. Without belaboring the point, the fact is, if you had a little note at the theater you could hand out to the parent who is there, then at that particular point the parent could make the decision.

Mr. SELIG. I think the suggestion is a good one. Would you suggest that it be done as the patron enters the theater or leaves the theater?

Mr. Russo. It is my suggestion that it be there, and a patron could come by any time he wants and pick it up at his own whim and make his own decision.

A lot of our theaters are now in big shopping malls, so as a person is shopping he can pick it up. I don't know what the expense would be.

Mr. SELIG. I don't think the expense is too much. We would be very glad to consider it. It's a very good suggestion.

3. *Witness Farber*

Stephen Farber is the film critic and a contributing editor of *New West* magazine in Los Angeles. In 1970, he was a member of the rating board for 6 months. He stressed to the subcommittee that while he could describe the system as it was in 1970, times and procedures had changed.

Farber told the subcommittee how scripts used to be sent to the board in advance of filming. In effect, comments from the board acted as a censor of the films before they were made. Since no reliable psychological studies on the effect of movies upon children exist, a board's judgment of a film reflects its own opinions and a gaging of public opinion. Therefore, Farber believes:

The real concern of the board in ratings is what then would disturb adults rather than children. It's an interesting point

that I don't think a lot of outsiders really realize, that the board's concern is whether they would get complaints from adults, so they are considering the sensitivities of the parents, even though—I think it's worth pointing out—they've never, to my knowledge, taken surveys of public attitudes as to what the issues are, that parents are sensitive about. They see films by themselves and not with audiences, but they're really very much guessing, I think, as to what the sensitivities of the public are.

I think the standards of the board are troubling to a lot of people. They range from being infuriatingly literal minded to extremely vague. There are a few rigid, arbitrary rules, particularly in regard to language and nudity that will change over the years, but they seem to be in effect now; there are certain words that cannot be heard in PG films, and there is no nudity that can be shown unless it's from the side or back, I believe. They have some ridiculous rules.

But in other cases it's very vague. For instance, in regard to film violence—this is a question that has often troubled people—the distinction—how do you decide that one film is too violent for PG, but another film should fit perfectly well into that category.

I think the inconsistencies in the categories are what have inspired a lot of complaints from producers; they don't understand why their film had a PG while another did not. It is very subjective on the part of the board, and it's very difficult to define these distinctions.

Farber also stressed his belief that the issue under discussion is really censorship:

Yet, at the same time, it is distasteful to see the board members telling filmmakers what has to be cut out of their movies. I found that the board enjoyed its power over filmmakers in this area, even if it was only very minor cutting. It would hurt the artistry, I felt, in many cases, even though it didn't solve the problem that they were ostensibly working to solve, which was to mute the impact of the film.

This is why I've always objected to the statement that the board is not a censor board. Considering that the board has been involved in a great deal of editing of both scripts and films, I think all moviegoers are affected by what the board does, in the sense that they don't see the films that the writers and directors originally intended to make.

Also, a troubling point is that most directors are now required by contract with their studio to bring in a film with a particular rating. Usually, that means it must not have an X rating. It is required to be an R rating or less restrictive; although, I've seen some contracts where even a PG is required in advance, so this does place constraints on filmmakers that they are very aware of while they're shooting.

In particular, the X rating is used to force changes in films, and this is because most studios won't release X-rated films,

many theater chains, as we've heard, won't play them, many major newspapers won't advertise them.

Mr. Farber also asked to comment on the chairman's earlier exchange with Mr. Selig on the ratings and what information they really provide to parents.

I would prefer to see the board, rather than be involved in this kind of restrictive classification system, and involved in all the editing that they do, that they instead should simply disseminate information about the content of the film, with a simple recommendation as to whether the film is suitable for family viewing, for adults, or whatever.

I think that this would really be a way of giving information to the public. I question how much information is given by the present rating system.

Mr. Farber was asked by Mr. Corman if he could recall any specific examples of the board's fear of tangling with the majors. In a letter to the subcommittee, Mr. Farber later gave three examples of what he meant. It should be mentioned that the examples occurred some 7 years ago.

Farber does not feel that makeup of the board is slanted toward the majors. He also agrees with Messrs. Valenti, Corwin, and Selig that ratings really have no economic impact on films.

The chairman, Mr. Corman, and Farber engaged in a lengthy discussion of ratings in general.

Mr. Russo. Your feeling is that the rating board should rate for the children, for what the children would be offended by as opposed to what parents would be offended by, as I understand it; is that correct?

Mr. FARBER. Well, I think it's a difficult point, which is why I think it's impossible to make this kind of distinction.

That's why I say, I would prefer to see a more advisory kind of system than—

Mr. Russo. How do you like the suggestion that I made to Mr. Selig?

Mr. FARBER. Yes. I would be very much in favor of that, because I think that, you know, maybe these kinds of arbitrary distinctions between categories is really—an impossible kind of task—how one decides exactly what distinguishes a PG from an R film.

You either get into these absurd kind of literal minded rules I've mentioned, or they become so subjective that it's incomprehensible to anybody from the outside to look at it objectively.

At first I thought it was a sensible idea, but I just don't think it works very well. I think this kind of advisory system that you mentioned, just describing the films, you know, would be much more effective, and leave the enforcement to the theaters.

The board has always said—I should say, this is a way of forestalling Government censorship. That's one thing to be said for it, but we've seen that—even with the code system—

different cities and States—they still try to introduce their own classifications.

I'd rather see the rating system operate in a purely voluntary advisory fashion.

Mr. CORMAN. I'm a little troubled by your suggestion that perhaps just a narrative statement concerning the film might be the solution rather than the four categories. I think there might be considerable disputes among the people who are going to have to write this advisory opinion.

Maybe we should just leave it to the film critics to advise us in their columns. I think about the committee reports we write, there does seem to be some difference of view as to what words we ought to put in. You might have even more trouble just picking one letter.

Mr. FARBER. That may be true. I think, ideally, people should be able to, you know, find this information out for themselves. There are ways of finding it out. I'm just trying to think of an alternative to that.

All I can say is that I think the system, as it operates now, has a lot of problems. I'd like to try, you know, try this other kind of purely advisory and informative system and see how it works. It might be very difficult to implement too, but I just have found that the rating system, as it presently operates, really creates more problems than it solves.

Mr. RUSSO. But it's much better than Government regulation, don't you think?

Mr. FARBER. It is, but I'm not sure that those are the only alternatives.

Mr. CORMAN. I believe we just have to accept the fact that society puts restraints on people under 18. I have a strong feeling that if the system was totally voluntary, that there would be some exercise of police powers.

If it's matter of that kind of prohibition, we're going to find some Government agency making a decision, film by film.

Mr. FARBER. Well, that still happens in terms of films that are really hardcore; I mean, those would certainly, I think, still be kept from minors, because the law is very clear in regard to those kinds of films. Those theaters, I understand, enforce the age restrictions very stringently in any case.

When the theaters are going to have legal problems on that kind of explicit sex film, I don't think those would be available to children if there were no rating system. That has very little to do with most of the films seen by the board, which are not, in any stretch of the imagination, legally obscene.

Mr. CORMAN. Maybe not by a stretch of your or my imagination, but by the city council of some cities and towns across the country.

Chairman Russo followed up Farber's comments on the hardships he believes independent filmmakers face.

Mr. Russo. Why did you say the rating board was harsher on independent filmmakers?

Mr. FARBER. The only thing—again, it was a certain prejudice. You can't escape it completely. I don't think anybody can.

A lot of the independent films that we saw were, you know, obviously very-low budget, and they didn't have very good production values. The acting wasn't very good. They may have been meant to be exploitation films—not necessarily sex films, but motorcycle films that were strictly exploitation films.

Although, the board says that they're not judging quality of films or artistic merit, this does enter into their voting, because they really felt that these low budget, independent films were sleazier films and, therefore, you know, they didn't have the quality, they weren't as respectable, they didn't have the prestige of some of the, you know, big studio films by major directors, so they felt they could be much tougher in demanding cuts because they weren't going to affect the artistry of the film anyway.

If they felt this was just a shock exploitation, they would be more insistent on cuts. They would be much more sensitive if this was an artist and, you know, they couldn't tamper as much.

I mean, everybody, when they evaluate films, does consider the quality of the film. You can't totally separate that. I think that was one of the reasons why they were harsher on independent films.

Mr. RUSSO. How would you take a subjective system like the rating system and make it objective?

Mr. FARBER. It's impossible, I think, to really be objective, ultimately, which is why I'm not sure that the system can really function in an objective way, which it pretends to do in these categories of sort of mathematical symbols.

The presumption is that we know exactly what a PG film is, and what an R film is, and what an X film is, but no one knows if it's truly subjective.

Mr. RUSSO. Well, you do have some good things to say about the rating system anyway.

You mentioned that the existing rating system may have helped in encouraging maturity in many American movies, so it has helped the creativity, the freedom that's needed in the film industry.

Mr. FARBER. I think, again, at the time it was introduced—

Mr. RUSSO. Do you still feel the same about that statement as you did then?

Mr. FARBER. Well, I don't know. I think that these changes would have come into films simply because the filmmakers were insisting on it. The code simply was not going to be able to regulate the content of films indefinitely. It might have taken a little bit longer. The thing has sort of retreated a little in the last couple of years. During the first couple of years of the rating system there was a real surge of much franker

adult films for a while. I think it's sort of gone backward. People have gotten frightened again, partly because they feel the audiences are tired of it.

I think the rating system had a positive effect. I think it had a lot of negative effects, too.

4. *Witness Riddell*

Roger C. Riddell is both a film producer and distributor. Mr. Riddell appeared before the subcommittee primarily to discuss his problems with a film called "Dogs." The producer of "Dogs," Mr. Allan Bodoh, was scheduled to testify on two later occasions, but was unable to appear due to conflicts with the shooting schedule of his present production.

"Dogs" had received an R. It went to appeal and again came out with an R. As for the problems it caused Mr. Riddell:

In the case of "Dogs," which was set out very, very carefully, and projected to be—to our investors and to everybody concerned with making the film—that we would be making a PG, camp horror film, where dogs would turn on their masters for some unknown reason and cause havoc in a small town. Like Alfred Hitchcock, "The Birds," or many of the old zombie movies we used to see when we were kids.

It was supposed to be exciting, have a lot of action, and it was really supposed to be funny, because some of the things were very, very absurd.

Unfortunately, the rating board didn't think it was very funny, and they did give it an R rating. It may or may not be justified, standing on its own, whether it receives an R rating.

Just to mention a few films that have received a PG rating, that I and my colleagues feel are far more violent than "Dogs," "Jaws," which has been a phenomenal success, and I thought that was an extremely violent film.

"Killer Elite," "Grizzly," "Food of the Gods," all received PG ratings. And in viewing those films, before and after we produced "Dogs," I still have the same conclusion, and our investors still have the same conclusion, that our film wasn't anywhere near as scary or violent. We had no sex in it, no nudity. It has turned out to be kind of a camp film where people laugh at it, or laugh at the action, the absurdity of the action rather than, you know, being afraid or having nightmares about it.

I do feel that the R restriction has cost me money in two ways; considerable money.

First, at the box office. I have personally stood at theaters that have multiple screens. Parents drop off children, preteens, or young teens. They come running up to box office to see "Dogs," and they're turned away; literally by the hundreds on the Saturdays and Sundays.

The parents don't really seem to care. The kids want to go see "Dogs" and the parents are either unaware of the rating or really don't care whether it's rated R, PG, or G. This causes problems for me in lost revenue.

I've seen many, many parents get upset that the kids can't get in. They even go so far as to buy a ticket themselves, take the kids in and leave and go shopping.

In other cases it's been a windfall to our competition who has a G or PG picture playing at the same screen. The kids line up to see "Dogs," they can't get in to see it, they are turned away, so they go see some other film; possibly a film that's more violent, for instance, in "Food of the Gods," where rats devour people, or "Grizzly," where grizzly bears devour children. We don't have anything that violent or destructive in "Dogs."

The other area that it cost me a great deal of money is—it's not really the rating board's fault—the television stations have taken a hard stand, obviously, against X-rated films and R-rated films, and in many parts of the country I'm restricted to the time periods that I can advertise my product.

Virtually, that is the only way I can exist, because I can't afford to hire Paul Newman or Steve McQueen or whomever, you know, at a multimillion-dollar figure, so I have to rely on getting my films across to the public via television, radio, newspaper media.

But I am restricted in the areas that I can show my television spots through very expensive times; usually late prime time or late fringe.

In some cases I'm totally restricted from showing any commercials at all, or even mentioning the name of the film. This varies from market to market, which makes it very difficult for me as a distributor to plan my market strategy for the film.

So we've had to revise our commercials five different times, and the cost each time has been roughly \$25,000 to \$30,000, so there's a great deal of money lost there, because I've had to try to comply just because of the R rating, even though our commercials show very, very little violence or no violence at all.

The strange thing about it is that we are restricted from putting our commercials next to many films that are—television programs that are far more violent than we're showing in our TV spots, or that our film is.

For instance, there are probably many more killings and far more violence in "Starsky and Hutch," or "Bionic Woman," or any of these action adventures, Quinn-Martin type of films. It doesn't seem fair or equitable to me to be restricted in that area.

I feel that the industry has done a really good job in taking care of themselves as far as setting up their own standards and policing themselves as the rating system goes.

But I do feel in some cases—maybe I'm just a paranoid independent producer and distributor again—I think they do favor big business or the big companies. I'm stuck down in Newport Beach and I'm not up here everyday lunching at the Brown Derby or in New York at all the major studios. Most of my films are shot on location, as far away from Hollywood as

I can get. I'm not in the clique or the organization, so I have very little pull. I don't see any smiling faces when I go into the rating board, or any handshakes, because I really don't know anybody.

In that case I feel that we're probably discriminated against. Or, if there's an area between a PG and an R, I can't apply any of the pressures that we all know apply in all businesses. You're usually better off if you know somebody, if you know somebody on the inside, if you're friendly with somebody, if you bought somebody lunch; not just in the movie business, but in every business it seems to be that way.

I think, again, the MPAA is no different from any other organization where personal contact is very important, and favoritism—it's not really the rule, but if it gets to the point where it can go one way or the other, if you are Paramount or Columbia, you're going to do better than a small independent.

Basically, in summary, the ratings over the past 10 years have done a good job. I'll state that again. But I think we need better guidelines as far as the difference between a PG and R.

Mr. Riddell also told the subcommittee that some of his former investors probably would no longer invest in his pictures because he produced an R film. So while "Dogs" did "very, very well" financially, later productions could be financially affected merely because of the rating category Riddell ended up in.

5. Witness Radnitz

The final witness in Los Angeles was the distinguished producer, Robert B. Radnitz. Radnitz is probably best known for his film "Sounder." That film brought him many accolades, including being honored by a Joint Session of Congress. Several of his other films—"A Dog of Flanders," "Misty," "The Little Ark," "My Side of the Mountain"—are known to thousands of American families.

Before addressing the rating system, the witness discussed his philosophy as a motion picture producer:

I believe all art is, among other things, a form of identification and communication. I believe that film is an art and an entertainment form, and that as an artist practicing in this form, my contribution can lie in only one direction, finding a way of using the motion picture medium to best tell, cinematically, the things that are important to me.

I must find my own way and express my own thoughts. I reject, categorically, any attempt to please others first. I reject the ever present, hydra headed canard, the attempt to find the subject matter that everyone is going to wish to see.

These themes exist perforce, but unless they are themes that I believe in, stories that are important to me, then all I am able to do is go through the motions: the heart, the senses, the insight is missing.

My films, as I say, must be meaningful to me. I've got to believe in them; otherwise, it is impossible for me to put the kind of love I want to put into my films.

I believe that it is important to entertain, but I feel that this is a word which is, today, in serious need of reexamination.

Radnitz has fought the rating system since its inception. He believes it to be a ploy by the movie industry to ward off Federal legislation. However, instead of serving that purpose, he thinks the system has brought the industry closer to Federal legislation than it ever has been.

Personally, I have nothing against sex or violence in any film for anyone, provided that it not be gratuitous. When it is, it should be castigated for what it is, bad filmmaking.

I believe in the American people's ability to discern for themselves.

There is much that I personally don't like on today's screen. We are becoming a nation inured to violence, and I believe that a good deal of responsibility for this falls on the head of our industry.

I am well aware of the argument made by the proponents and apologists of visual violence, that it is a catharsis, allowing us to act out our own violent tendencies in a darkened theater as opposed to actually going out and shooting someone.

But, I find this contention preposterous and self-serving. It is not unlike the doctors the tobacco industry occasionally produces to state: "We are not exactly sure that there is any corollary between smoking and cancer."

Even so, I would be the first man on the battlements to defend anyone's right to make the sort of film he or she chooses, anything else is censorship. If a democracy is to flourish, such censorship under any guise, is, I believe, intolerable.

The code and rating administration and its supporters say that the ratings are not censorship, but merely a cautionary device that enables parents to protect their children from content which might be disturbing.

However, even under this mantle, I believe it is a failure. Far too many films rated PG, or even G, are, in my opinion, larded with gratuitous violence.

In practice, the code too frequently legislates against sex, but allows violence to go by the boards. The frequency with which this occurs, despite the contrary protestations of the code and its spokesman has become so great that the code itself has become suspect in the eyes of filmgoers, the Catholic Film Office, the National Council of Churches, and important film critics throughout the country.

Actually, the industry, through the code, has now become so visible that it will always be vulnerable to those that would attack and censor it.

The simple expedience of labeling films will not ward off the battle. I believe that this hearing today, in point of fact, speaks to that issue.

Indeed, the rating system is a form of censorship, and censorship or self-censorship, as the industry euphemistically calls it, historically breeds further censorship.

Radnitz has had hundreds of conversations with teachers and parents throughout the Nation. As a result, he believes that they basically reject the current system. The rating system has so structured our thinking, Radnitz contends, that a G rating has become synonymous "with the sort of pap and suet concoction even youngsters don't wish to view." The situation has thus affected the nature of moviemaking.

Example: You wish to make a serious film which just happens to have no sex or violence; after all, not all stories of a serious nature contain these ingredients. At any rate, you make the film and end up with a G, but that rating will, by its nature, initially put off a good part of the audience that might otherwise want to see the film.

It is true, of course, that the negative aspects of a G film can be circumvented in the long run. Our "Sounder" was a good example of this. I submit that it is tough enough to sell a film on its own merits without having to spend an equal amount of time convincing the audience that your product is not a taffy pull.

And though some G's have made it big, I also submit that lately these successes have diminished. In 1968, according to the code, 38.7 percent of the pictures produced were G rated, and 20.2 were R rated. In 1976, 12.8 were G rated, and 44 percent were R rated.

That the G-rated film is an endangered species does not really concern me. What does concern me is this: Because of the public's antipathy to the G, we filmmakers are eschewing certain fine film subjects, and the treatment of same.

For though the material may be excellent, the findings, the judgment of the rating system's celluloid Solomons, will be G, an audience turnoff.

The producer then recounted two of his experiences with the code:

A number of years ago I made a film entitled "The Little Ark," based on the novel by the Dutch author, Jan de Hartog. The novel and the film chronicled the adventures of two youngsters who became separated from their minister father during the 1952 floods in Holland.

When the film was submitted to the code I was startled to get a call from someone—whose name I can't recall—informing me that the picture was to be rated R, due to the fact that there were two sequences they objected to.

One was a sequence in which the children, brother and sister, were picked up by a hospital ship, soaking wet, and told to take off their clothes.

The little boy started to take his clothes off, but the little girl was hesitant. The little boy turned to his sister—I should say that these children were about 10 and 9 years old—the little boy turned to his sister and said, "Oh, go ahead, Adinda. You've got nothing to show anyway."

The other sequence dealt with a crazed farmer who had been rescued by the children and by their friend, the captain of the ship, as well as the cook.

This farmer, when suddenly brought to safe ground, finds himself the center of light bulbs and television cameras exploding in his face. He goes berserk and stabs the cook. The children see their dear friend killed.

There was nothing gory in this scene. In point of fact, many educators, as well as religious periodicals, pointed up this scene, stating it was a marvelous object lesson to children, that sometimes their closest friends die. It dealt with death, I believe, intelligently.

At any rate I called the then head of the code, Dr. Aaron Stern, who informed me he had not seen the film at the time, but who said to me on the phone, in so many words, "Don't worry about it, Bob; we know you wouldn't make a film that was in any way untoward," et cetera. I want to deal with this attitude later.

Dr. Stern viewed the film with me. After removing two or three frames of the pitchfork, the film was changed from possible R to a G—from an R to a G.

You see, it's all right to blow people's heads off in all kinds of mayhem and get PG's, but this small honest tale of two youngsters almost received an R.

I would like to give one other example of this kind of idiocy: We recently had a film entitled "Birch Interval," which was the story of a young girl growing up in an Amish community in Pennsylvania.

The film received a PG. I had no objections at all to this for, as I stated, I hold no brief for the code. And, as I further stated, in my opinion, a G has become a stigma, meaning good to an audience.

I received a call from someone at the code, this time informing me that the trailer of the film had been red banded.

I asked, "What is a red band," I was informed that all trailers—something I had not known—nor had many of my friends who make films—possibly we should have, but we didn't know—all trailers are rated.

A red band is synonymous with an X, and a green band is synonymous with a G. Now, already you begin to see the gobbledygook in the whole thing. We have four letters denoting the rating of films, but there are only two forms rating trailers. Four for the films, two for the trailers.

The bands are put on the film cans. The green band, as officially described, means—and I'm quoting—"it is certified by the MPAA director of the code as being suitable for exhibition to all audiences," unquote.

But listen to this: You can have an R- or X- or PG-rated film from which you can make an ostensible G-rated trailer. Let me repeat that. You can have an R- or X- or PG-rated film from which you can make an ostensible G-rated trailer, which further means that such R-rated films, as "Taxi Driver," "Lipstick," "The Texas Chain-Saw Massacre," "The First Nudie Musical," "One Flew Over the Cuckoo's Nest," "Gable and Lombard," the two "Godfathers," parts 1 and 2, all R-rated films, but had G-rated trailers. They can be shown with G-rated pictures. It gets even more ridiculous.

The largest medium for bringing an audience into a theater today is the television trailer, as the gentleman who preceded me discussed.

Again, one can show on television trailers for R-rated movies at any time, with the proviso that the station says they are clear, but they are still trailers for R-rated movies. The trailer may have been cleaned up, but nevertheless, I believe, an invitation to see an R-rated movie.

Now, this, to me, is the height of cynicism. If the avowed purpose of the rating system is to assure that impressionable youngsters can see certain films only under the strictest supervision, if the avowed purpose for the code is to be a guide for parents, the use of the trailers is, for me, a total industry cynicism.

Any child seeing a trailer in a theater—any child seeing a trailer in a theater or on television is obviously going to attempt to inveigle his parents to let him see the film. We've all been children.

But back to "Birch Interval" and its red- or X-banded rating. When I was informed of this I immediately called Richard Heffner, who appeared to me to be extremely intelligent, a young gentleman, who had recently been appointed head of the code and rating administration.

Mr. Heffner politely informed me—explained that the red-label judgment had come from a woman who screened the trailer, hadn't been able to see it too well because the print was bad—I never could understand what that was about—and who had objected to a line of dialog that went "Whose baby are you carrying around, Marie?"

I informed Mr. Heffner that that explanation didn't make much sense. Mr. Heffner agreed, and also agreed to change the "Birch" trailer rating from red to green.

He also said, as had Dr. Stern before him, that he knew I wouldn't make any untoward films.

Mr. Heffner is, as I stated—and I really believe this—an honest, serious gentleman—nevertheless, I see two cynical areas here which disturb me.

The film, "Birch Interval," is rated PG, but the trailer, which contained no additional scenes, was given a red band; X. Ridiculous.

Second, Mr. Heffner's attitude, as Dr. Stern's before him, that Bob Radnitz would never make any films that were untoward—which is why the ratings were changed—this attitude, gentlemen, I find frightening.

Suppose someone who did not have my previous record were to complain to the code; what, then, would be the code's attitude?

I don't feel that I should be given any privilege that might conceivably be denied anyone else.

Instead of the present code, Radnitz would "totally junk the system." Parents should avail themselves of the various avenues available to find out about films. On occasion, they should go with their children. For Radnitz, the code has had no appreciable influence on the

movies. There is more violence and sex than ever before on the screen. Radnitz said, "The code, in my opinion, has simply become a propaganda tool that allows and encourages this license."

The chairman and Radnitz discussed alternatives to the present system.

Mr. Russo. I'm saying, again, in view of the Supreme Court case, in view of the fact that the parents probably won't exercise the control you're talking about what should be done, knowing that that exists in reality rather than the ideal world?

I sit on the Subcommittee on Communications. We had an interesting 1-day hearing on violence and sex. We had testimony from experts who have seen children who have seen a tremendous amount of violence, and they found out that if the parent were sitting in the room at the time the child was watching the violent act, and the parent was to explain the reason for it, it was terrific. In fact, it was an educational benefit for the child. But we don't have that. The parent doesn't sit with the child. How do we handle that?

Mr. RADNITZ. Well, I don't think we handle it by the rating system as it presently exists.

You're asking me, you know, what do I have to offer that would be better. I haven't come up with anything. All I am saying, as far as I'm concerned, the rating system, as it's presently operated, is not doing the job that I would like to see done. I don't feel that it is helping in any of the areas that it would like to help in. It just doesn't seem to work.

I've also said that in my opinion, involvement in this country is a very important thing. I'm aware of the fact that a parent cannot supervise a television set, but when we're dealing with youngsters, I don't think we can leave it—as I said earlier—let the motion picture house become a babysitter, and if a parent is truly concerned, then I think the parent should go with the youngster to the theater.

And there are other avenues that the parent can make some decisions from.

One of you gentlemen, I believe, talked about review. Maybe you were saying it as a joke—that maybe critics should be the ones who decide.

I certainly would say that by reading critics—and I would certainly say by looking at ads—parents have a very good idea of what kind of film it is they're going to see.

I further think that the idea of having some kind of handbill or something of that nature at the theater is a very good idea. In fact, I never thought of it.

Finally, subcommittee counsel and the witness discussed the problem of certain themes and their relevance to a rating.

Mr. LYNCH. Over the years, as you've watched many films being rated, do you feel that certain films, because of the social issues they've dealt with, have gotten a particular rating?

For example, in Mr. Farber's book he cites a couple of films that dealt with marihuana quite heavily, and he felt that they polevaulted into a certain higher rating because the ratings board had very touchy feelings on that particular subject.

MR. RADNITZ. I think that's probably true. I think it's unfortunate, because it doesn't make any difference in my mind whether we're dealing with sex, violence, marihuana, or any other kind of drug. I think these are all things that young people—very young people today—know about.

What disturbs me, whether they happen to be in a film that the young person sees, or the adult sees, is when they are put in there as a grabber, when they're untoward, when they're just stuck in there to make some kind of an exploitation picture.

The important thing with the rules, as I understand them today, is this: That if one were to deal with a film—let's say with drugs, heroin, for example—we are dealing, frankly, with a film ourselves at this point in time—we're making a film called "A Hero Ain't Nothing But a Sandwich," which is just a story of a young black child in Watts here whose father has split the scene and his mother is living with a surrogate father. The boy would like nothing more than to put his arms around this man and call him "father," but like all of us, he's afraid of rejection, whether we happen to be 12 or we happen to be 200.

The boy gets into a drug situation. Now, that problem of the surrogate father, and the problem of the youngster getting into drugs is a very big problem in our country today.

We hope to deal with this—we believe we're dealing with it—in a very honest fashion. Now, what do I mean by "honesty?"

I mean, if we were to cut away from the needle going into this 12- or 13-year-old boy's arm then we wouldn't be telling an honest story.

If we were to totally expunge some of the language in the film, then the very peer group—the very peer group that will hopefully benefit by this film will know that the film that they are viewing has been carmeled. I think that would be terribly unfortunate.

Most of all, the unfortunate thing is this—I don't mean to be trying it here right now—there are some members of the rating board here possibly—it's unfortunate that with the way the code is structured now, this film will probably receive an R, and the very youngsters—the very youngsters whom we believe will benefit from this film will be excluded from seeing the film, unless they happen to come with their parents. I think that's wrong. I think that's another kind of area that doesn't make any sense to me in the way the code is regulated today.

I think each thing should be examined on its own.

C. MAY 12, 1977, IN WASHINGTON, D.C.

1. Witness Owensby

Earl Owensby was introduced to the subcommittee by his Congressman, the Honorable James T. Broyhill, Republican, of North Carolina. Mr. Broyhill recounted Owensby's rather remarkable advancement to head of his own film company. Orphaned at an early age, Owensby sold pneumatic tools from the trunk of his car after he finished his service in the Marine Corps. He became quite successful and at one time owned almost a dozen companies. Since entering film production in 1973, he has produced six features—all moneymakers. A deacon in the Baptist church, Owensby now makes films at his own industrial park in Shelby, N.C. His films, according to Owensby, do not contain profane words or any nude scenes. Realistic violence, however, is almost a trademark with him. It is apparently for this reason that Owensby has been in conflict with the rating system.

Owensby recounted his version of the course of his film, "Dark Sunday," through the rating system. Supposedly the movie contained no sex, no nudity, and no obscene language. The violence in the movie was to be all "bullet hits." Yet he was told that due to graphic violence, the film would receive an X rating.

Owensby told a board member that he wanted a PG. The story of the rating process in this instance became a confusing one for the subcommittee. As Owensby told the subcommittee:

They sent the movie to the MPAA and they rated it X. I panicked because I made the statement once that, you know, if I ever made a movie and it is X-rated I will burn the negatives. But we went back and forth with the California and New York offices and Mr. Heffner. They sent our film from Los Angeles to New York for Mr. Heffner to review. They did not tell us what the rating was.

In Los Angeles they said, that is why I had to get it in release: I had to get my money back out of it. I went to Mr. Heffner and spoke to him. After some weeks passed he said, we rated your movie X. He said the reason was graphic violence. I said well, what can I do? He said, nothing. Appeal it if you want to.

Well, I certainly wanted to appeal it. I spoke to Mr. Van Schmus. I called him and he said well, we have talked it over. If you will cut out a few frames of this we can get an R rating. I said okay, I will do it.

I went to the editing room but on the way down I said, no, I just do not believe I will cut it. I will appeal it like it is. I called him and told him. He said, go ahead and start the appeals process. Write Mr. Valenti in Washington, D.C. and start the appeal process, which I did.

There was a time passage of maybe 6 to 8 days. He said, you cannot appeal an X to a PG. He said, it is just not done. I said, it is going to be done this time because I want a PG. He called me from the L.A. Airport and said that they rated the movie R with no cuts.

So now we have gone from sour cabbage to banana pudding, and I am supposed to accept that and go along with it. We did appeal it, and it went between Mr. Valenti in Washington—we appealed the rating for an R through him in Washington, and he took it to New York. It was a 10 to 5 vote. They retained the R. So we ended up with an R on the movie.

That was where we were on "Dark Sunday." I had another movie called "Brass Ring" in 1973. It had two bullet hits where two policemen got shot. That is all there is in the movie. There is no violence. It has two bullet hits, and they rated it R. We shot for a G and finally accepted a PG.

We shot a movie in 1976 which had nothing, no bullet hits. It was a comedy, and we ended up with a PG. We shot it for a G. After this, I decided we better do something about it.

That is where we are today. I have written Congressman Broyhill and asked him what could we do. Senator Morgan was also contacted, and Congressman Broyhill got us into this committee. Then investigations started.

I think the ratings are unclear. If you take a G, PG, R, or an X, that does not tell the American public enough, I do not think if somebody makes a pornographic movie, they do not mind it being labeled that. It should be stamped as pornography. If it is an R because of violence, then people should know it is for violence. I do not want my kids to be embarrassed. If any of you folks go to the movies, I am sure you have kids too and you feel the same way.

In his prepared statement, Owensby outlined his suggestions for improvement in the system. He also argued that a rating should be given for violence only.

Following are some suggestions which we feel would benefit the movie industry as well as the movie-going public:

(1) Classify or rate movies with more exact terminology by labeling each according to its exploitation of: sex; violence; gore; horror; nudity; profanity; humor; clean family entertainment; Etc.

(2) Movies made on the East Coast should be rated on the East Coast, and vice versa.

(3) The Rating Boards should consist of unbiased members who are not affiliated with the movie industry.

One final point which we would like to bring out is that rating a movie "R" or "X" because of violence depicted in the movie has been ruled unconstitutional by U.S. District Judge William Taylor in a ruling against the City of Dallas. A copy of an article appearing in Variety magazine March 30, 1977, reporting the decision, is attached.

[From Variety, Mar. 30, 1977]

DALLAS FILM RATINGS BASED ON VIOLENCE "UNCONSTITUTIONAL"

In a ruling that downgrades violence as grounds for censorship, a federal judge in Dallas has blocked city censors from

ranking Warner Bros.' "The Late Show" as unsuitable for young persons.

U.S. District Judge William Taylor struck down as unconstitutional a Dallas ordinance under which the city's Motion Picture Classification Board held the pic, though rated PG, was nonetheless unsuitable because the board believed it is "patently offensive to the average person applying contemporary community standards with respect to what is suitable for viewing by young persons."

Judge Taylor ruled, "Such classification standards are void and unconstitutional on their face . . . First Amendment rights—the most important of the Bill of Rights—may not be circumvented except in exceptional situations. The standard for classification as to youth must be restricted to the control of obscenity."

The judge's order stops the city from preventing those under 16 from attending without parents when pic opens at Esquire Theater there on April 8. By comparison, the PG only flags a warning to parents while the city ordinance would have been stiffer than an R rating.

Owensby was particularly incensed by what he felt was the board's softer ratings for some very violent major films. He cited Clint Eastwood's "The Outlaw Josey Wales" as a primary example.

The producer also told the subcommittee that his film was shown in Canada. According to him, a Government board rates the films there. He said that "Dark Sunday" uncut received a restriction of 14 years and under, which supposedly is the same as a PG in the United States. Owensby also noted the advertising problems with an R or an X film, especially in Southern States. He also cited what he believes to be an unfair voting advantage for the major studios on the appeals board.

2. *Witness Dana*

Jonathan M. Dana is an independent filmmaker from California. He produced and directed a cinéma vérité documentary about open marriage with his wife Bunny Peters Dana. The film "Sandstone," is about an unusual experiment in group living, a community which practiced an open sexual lifestyle.

The film was originally rated X and was upheld on appeal. It has since been edited and received an R. The controversy surrounding the film actually began quite some time ago. Originally, the film was not submitted for a rating.

The problem and confusion over "Sandstone" started with our first contact with the ratings board. When the film was first completed, a member of the board had occasion to see the film in an informal setting, almost, I believe, by accident. When asked about the likely rating on the film, the person responded in so many words, "Save your time and money. The picture will be rated X." Whether or not we should have taken that advice, the fact is that we did. Our decision was that the money required for the fee would be better spent "launching" the picture. We were operating on a shoestring and we could not afford to waste a penny.

"Sandstone" thus opened in various test markets with a self-imposed X rating, a procedure which is currently permissible under the code. If we were going to be saddled with an X rating, why pay for it? I will have more to say later about this point. From the first theatrical engagement the problems of distributing an X-rated film, self-imposed or not, became apparent. Television advertising was out completely; many other newspapers would not take our ads and the same was true for radio stations; where we could advertise, we were often severely limited in what we could say or how we could say it. You have heard all this before, no doubt, but it is worth repeating because it is an insidious problem, and one worthy of your attention and followup. Simply stated, an X rating is by and large a curse.

In March 1976, following the test engagement, a trusted friend and associate, Richard Anobile, the noted film author, suggested that we submit the film officially to the MPAA for a rating. This was about the time when the film would go into full national release—the Los Angeles opening was to be on May 5, Anobile's point was that in the time since we had last considered taking "Sandstone" to the MPAA, times had changed.

The MPAA, he argued, was now dealing with sexuality in a more enlightened manner, and he felt the picture could well receive an R, which he felt it deserved. This point was confirmed to whatever extent it could be by a phone call from Anobile to an acquaintance of his who was, and still is, a voting member of the Code and Rating Administration. We were still undecided about a course of action when a further piece of information came through from that same CARA source. We were told very specifically that unless "Sandstone" received an official rating from MPAA before it opened in Los Angeles several weeks hence, there was a very high likelihood that we would not be able to submit the film for an R rating at a later date, regardless of how much editing was done to the picture.

That news came as a total shock to us and caused near chaos. An X rating places serious limitations on the payoff potential of a film—estimates vary, but it is possible that up to 65 percent of the theaters in America will not play an X-rated picture, regardless of content. It had been our operating strategy to play the film to as wide an audience as possible in its uncut form, maintaining the total artistic integrity of the film. Later, when the market for the X was exhausted, we would make whatever changes were necessary to obtain an R and obtain wider payoff. We might be making certain compromises of principle at that time, but we did have an obligation to our investors, and we would have by that time made our statement.

I would like to point out here that last week Richard Heffner, chairman of the CARA, found out for the first time why we chose the moment we did to submit the film officially. He was appalled to find out the nature of the information

we had received from the board member. The information, it turns out, was false. We could have submitted the picture after the Los Angeles opening or any other time for the R rating. Heffner apologized profusely, begged us please to come to him directly with questions, and gained a great insight into the kind of confused feedback we had been getting from the CARA. This is not the only example of this.

Anyhow, based upon the information we had received, we had no choice but to submit the picture and hope for the best. We sincerely felt the picture deserved an R, that this was the type of picture that would be a fine example of an intelligent, mature attitude on the part of the MPAA toward sexuality, that there would be thousands of parents across America who would be interested in a film of this type not only for themselves, but for the education and edification of their teenage children, who would shortly be making major life decisions regarding marriage and sexual lifestyle. And where better than a movie theater, a closed environment, available only to those who make the voluntary decision to purchase a ticket. So we waited.

The first word we received was through our unofficial channel, a telephone conversation between Mr. Anobile and his acquaintance on the board. The word was that no decision had been reached. The picture might receive an R, and that if the decision were X, it might boil down to one or two shots. We received the clear impression that it was a borderline case.

Approximately 48 hours after we submitted the film we received word that the film was to be rated X. Needless to say, we were disappointed, and immediately made an appointment to see Mr. Al Van Schmus, CARA panel member who was acting as official liaison to us. He began the meeting by commending us for the fine work we had done with a highly sensitive subject and told us that it was nice to see people producing something other than the junk they were used to seeing most of the time. He then recommended specifically that we appeal the rating before the appeals board which convenes in New York. He said that "Sandstone" would make an ideal vehicle for an appeal, since it combined the elements of sexuality and documentary journalism in a sensitive, intelligent manner. We asked him specifically if he felt it was worth the trip to New York and the additional expense—additional fee, plus travel—for the appeal. Did he feel we had a chance to win? He responded yes, he did feel we had a chance, but that of course the ultimate decision rested with us.

He stated that the board in Los Angeles operated under very strict rules with regard to the classification of films into the various categories. The Los Angeles board was not empowered to make any exceptions to these rules. This was the function of the appeals board. He wished us well, asked to be kept informed of our actions, and told us he would in no way be offended if we made hay of him in the trades. I have

nothing but the highest regard for Mr. Van Schmus as a man. He is doing his best in a difficult, even intolerable role.

During that particular meeting we inquired as to why was our film an X. We would need this information in making our appeal. We were informed that there was no one shot or series of shots that by itself would constitute an X—no erect genitals, no shots of “penetration,” no “pink” as the current phrase goes. The reason for the X was a very subtle accumulation effect of the various shots of lovemaking which appear in one sequence near the end of the picture. This 3- or 4-minute sequence, by the way, contains the only specifically sexual activity in the film, whose total running time is approximately 80 minutes.

The Danas appealed their rating. Their friend, Mr. Anobile, accompanied them to New York. In a letter to *Variety*, he recounted his impression of the appeal hearing:

On Tuesday, April 27, I had the opportunity to sit in on a meeting of the appeals board of the Motion Picture Association of America in New York City. The group, presided over by Richard Heffner, was ostensibly meeting to review the feature documentary, “Sandstone,” and to hear the filmmakers, Bunny and Jonathan Dana, present their case for a change of rating from an X to an R.

The appeals board screened the film at the Rizzoli Screening Room in New York, and the Danas and I were then asked to join the group. The Danas discussed their careers and their involvement with the film’s subject matter, the censorship imposed because of the X rating, and finally their belief that an R rating would be an adequate restriction for the film as it would allow parents to decide whether or not children should view the film.

Throughout the Danas’ presentation which lasted about 20 minutes, the group of 20 constantly moved in their seats, checked their wristwatches, looked up at the ceiling, and made it obvious to this observer that they were bored. The MPAA attorney ran up and down the small screening room aisle a number of times during the Danas’ talk, and one member of the group fell off of his chair and into the aisle as the Danas spoke. As they ended their presentation, the Danas asked for questions. There were none.

Richard Heffner then took the floor and explained that he felt, “Some parents of young children would find an R rating inadequate for Sandstone, therefore, I ask the board to sustain the X rating.” He then went on to tell the Danas that any censorship problems they had with the *L.A. Times* is not the MPAA’s problem, and “I suggest you take it up with Dorothy.” Heffner’s reference to the owner of the *Times*, Dorothy Chandler, got him a round of laughter from his group, and he sat down genuinely pleased with his dismissal presentation.

The Danas were then given time to rebut Heffner’s 2-minute talk, but there was nothing to rebut. He had said

nothing. In essence, Heffner has said that the film was rated X because the film was rated X.

The Danas and I were led out of the room by Heffner and hardly had the door closed behind us when a man in a trench-coat, a member of the anonymous board, ran out to Heffner, smiled and announced, "X sustained 16 to 1."

Maybe I have been naive. But for some time I have been under the impression that the MPAA was genuinely interested in this task. I also assumed that the individuals involved were thinking individuals hoping to avoid government censorship by presiding over an industry-controlled board which was to serve as a guide to filmgoers.

What a fool I was. Had Mr. Heffner been required to appear in a U.S. court regarding the "Sandstone" appeal and had he uttered the same inanities to a judge, he would have been ejected from the court for wasting taxpayers' moneys.

I was embarrassed for Mr. Heffner and frustrated and angered over his and his group's obvious disdain for their task and the Danas. Possibly, had the Danas been represented by Frank Wells or Robert Redford or by any other major studio which contributes to the coffers of the MPAA and to the paychecks of the appeals board members, they might have been accorded more respect. But as this was not the case, they were treated as second-class industry citizens in a blatant suspension of the democratic process.

I now feel that the industry and its filmmakers would be better served by fighting government censors in a U.S. court, an open forum where somehow, traditionally, justice manages to prevail.

Further, I call for Richard Heffner's resignation and a complete overhaul of the appeals board so that the industry will, in the future, be accorded the benefit of rulings intelligently motivated by individuals who are not just biding their time to retirement by being warm bodies lending credence to an insidious travesty.

In his testimony, Dana attacked the entire ratings process. He complained that policy is set by a tightly knit review board. No records of appeals are kept, so it is difficult to reconstruct what goes on. He also assailed the organization of an appeal, claiming that a major studio can perhaps intimidate the board by mustering support that a small producer cannot.

* * * Three or four weeks prior to the "Sandstone" appeal, another appeal was held before the MPAA. In this instance, the producer of the film was successful in having the rating of his picture changed from an R to PG. The producer was Robert Redford, and the picture was "All the President's Men." For the first time in the history of the MPAA, a picture was rated PG with the repeated use of a certain well-known four-letter word. It's not that I object to the decision. I think it was the proper one. My point here is the scope of the effort put on by Warner Brothers and Wildwood, Redford's company, to present their case to the board.

It is my understanding that affidavits were entered from more than 200 educators, clerics, and social scientists on behalf of the PG. Two hundred. We can only guess at the cost in dollars and manpower of this operation. There is no way that I or any organization that I am affiliated with could have mounted such an offensive. It's simply a question of the economics of scale.

Let me give you another example. At the time and site of the Los Angeles hearings of this panel, I had a conversation with Jack Valenti in which he told me that it was policy, I repeat policy, of the MPAA never, I repeat never, to go into any litigation involving an X-rated film. In the past, and possibly even in the present, the MPAA has contributed dollars and energy to the defense of films in the category R or less. The most famous case is the "Carnal Knowledge" case which went to the Supreme Court. Nonetheless, a producer who receives an X rating from the board pays the same fee as the producer of an equally budgeted film failing in another category. The same fee, for fewer services. It is as though the MPAA turns its back on a producer after stigmatizing him with an X, and I don't think there is any doubt left in this room that an X is a stigma.

Now it so happens that most X-rated films are made by independent producers. Why, because by and large there is not enough money in it for the big guys. But for whatever reason, the burden again falls on the little guy. There have been several clear-cut cases of media censorship or suppression with regard to the exhibition of "Sandstone." Cases in which steps toward the maintenance of freedom of expression could have been fought for, and with a good chance of winning. These cases dies aborning because the large scale of dollars required to fight them through were too big for us to handle. By and large, these situations were a direct result of the X rating given us by the MPAA, but there was no way we could turn to them for help or support. We had been vetoed as a matter of policy, the black sheep of the family. Is it any wonder my respect for the organization has dwindled to the vanishing point?

Dana told the subcommittee that the appeals board should include more representatives of the independent community. He also believes educators, sociologists, et cetera, should be on that board. As for the X rating, Dana claims that the category only exists because it was a concession made to insure the system's establishment. Different individuals have given him different reasons for its existence.

Mr. LYNCH. You told me when you questioned both Mr. Valenti and Mr. Heffner as to why an X rating existed, and what was its purpose, that you got different responses.

Mr. DANA. Right. Throughout our dealings with the MPAA we have tried to get an answer to two questions. One is, what exactly constitutes an X rating? The second one is, who is the system designed to protect? What is the purpose of the system? What is it and what is its purpose?

We have received feedback from three different people, and all three are contradictory. Mr. Heffner, in the only official piece of paper that we have when we got the rating back—we received a subsequent one with a list of 13 shots that listed an accumulation—stated that “the rating board felt that most parents of young children would consider an R classification inadequate in respect to your documentation of sexual activities at one scene in question.”

There was no clarification of the words “most,” “young,” or “inadequate,” despite repeated requests. Young is defined as being under the category that they have so chosen to call X. Anything that is below it is too young. Our feeling was that this specifically was what an R was. What then is the difference between an X and an R? The function of an R rating is to provide an opportunity for parents to determine whether young children can or cannot see it. So it does not make sense to me that this is what it is.

Mr. LYNCH. What did Mr. Valenti tell you about an X?

Mr. DANA. This was not done specifically by me, but by Mr. Will Tusher. At that time he was with the Hollywood Reporter. Now he is with Daily Variety. He asked him the question in responding to the policy of refusing admittance to a minor, even if accompanied by a consenting parent. Mr. Valenti stated, and I am quoting from the Hollywood Reporter:

“It is one that the exhibitors want, Valenti stated, and generally speaking the exhibitors do that because they do not know whether the picture is obscene or not, legally. Many States have laws that say if a parent even takes his kid to a picture that has been declared legally obscene the exhibitor can be held criminally liable. They do this for safety’s sake, not knowing how a local jury is going to judge a picture.”

This gets back to the point I made in my remarks that it is about time that the MPAA stated clearly on the record what it is they are doing. This is a trade organization, and the function of MPAA is to sell tickets. If the MPAA feels it is in the best interest of the ticket seller—and the major studios, while they only make 30 percent of the films, sell 70 or 80 percent of the tickets—that if the MPAA feels it is in the best interest of these people, that they are feeling a pressure from the public or from Congress to rate pictures, then they will rate pictures.

If they feel the pressure is to dance on the sidewalk, my feeling is that they will dance on the sidewalk. This organization is geared to selling tickets. Everything else is secondary to that.

Now, there was a third opinion following the comments by Mr. Anobile, which were reprinted in an article in Weekly Variety coincidentally directly under the headline when Harry Reams was convicted. It elicited a response from Michael Mayer, who I believe is with the IFIDA, which is another subject entirely. In his—

Mr. RUSSO. What is the IFIDA?

Mr. DANA. It is an international distribution organization. Supposedly the independents that are represented on the board come from this organization.

Now, self-admittedly by Mr. Valenti, this organization is very weak now. It really controls no constituency in the American market anywhere. At this point they are trying desperately to save the seats. There is now an internal conflict going on with the members of this organization trying to hold onto their power slot.

Mr. LYNCH. They have seats on the appeals board?

Mr. DANA. Four or five seats on the appeals board. You can get more information on that from them. I am not an expert in this matter.

Mr. Myer wrote a letter in response. I do not have the entire letter with me, but I do have a statement out of it which does bear on this question. He stated:

"It is not the function of the appeals board to decide ratings on the basis of whether the film is suitable for children 16 and under."

Mr. Russo. Can you make a copy of that available for the record?

Mr. DANA. Yes, I will. I will also try to get a copy of the full letter.

Let me read you the full statement here:

"It is not the function of the appeals board to decide ratings on the basis of whether the film is suitable for children 16 and under, and it was the near unanimous verdict on this rating appeal that "Sandstone" is an adult picture made for adults and not for children."

Now, I have read the statement probably 100 times, and I do not understand what it means. In the first clause of the statement—unless it is a typo in Variety, which is a possibility, "it is not the function of the appeals board to decide the ratings on the basis of whether a film is suitable for children 16 and under," and then it goes on to say that "Sandstone" is an adult picture not designed for those people when they have just denied that this is their function. Now, if the case presented to them by Mr. Heffner and clearly given to us in the formal documentation we received, was the reason the picture was an X was specifically because the rating board felt that most parents would object, and Mr. Mayer, who is a member of the appeals board says it is not the function of the appeals board to decide that question, then we are arguing different points before different juries. It's apples and oranges. The same thing we were given the rating for does not apply to the people who are appealing it.

Concluding his appearance, Dana reiterated his main point about the reason for the rating system in the first place:

I would like to make it very clear that my primary interest here is not a matter of dollars and cents, and that the scale of my picture in terms of its dollars and cents value in no way

compares to that. But, I would also like to be very specific that it irritates me that Mr. Valenti and Mr. Heffner to some extent—but Mr. Valenti is the culprit in this case—get very pious when talking about people objecting to the economic impact of the rating system and the MPAA on their particular businesses when the fact is that the entire purpose of the MPAA—self-said or otherwise—is as an economic protection to the motion picture industry.

D. JUNE 15, 1977, IN WASHINGTON, D.C.

1. Witness Sullivan

The Reverend Patrick J. Sullivan is the director of the Office for Film and Broadcasting Review of the United States Catholic Conference. Since 1972, the office has served as an official observer at all hearings of the MPAA appeals board. For over 40 years, the Catholic church in the United States has favored and supported the principle of voluntary self-regulation by the movie industry rather than Government censorship. The recent increase in offensive films has strained that commitment. Father Sullivan delivered the office's views on several issues.

a. Preliminary observations:

The 1968 MPAA program was both a "code" and "rating" program. The original document sets forth explicitly detailed "standards for production" which "shall govern the administrator in his consideration of motion pictures submitted for code approval."

If a motion picture were judged to have satisfied these standards, it would be awarded the code seal of approval. The seal awarded, the second and separate question was the determination of the appropriate MPAA rating for the film. Obviously, a code-approved film would not be given an X rating. If a film were denied the seal of approval however on the grounds that it violated one or more of the standards of production, it could only qualify for the X rating.

Although the MPAA has never officially announced the fact to the public, it has indeed dropped the application of its "standards for production." There is no longer a code dimension to the original program; all that remains is the rating aspect. The MPAA continues to use the title, "Code and Rating Administration." whereas what is left, in fact, is solely a "rating administration."

The change is more than semantic. It is, in our view, substantive and has had implications for the rating administration as well as for the MPAA appeals board. In dropping the application of its "standards for production," the MPAA has not replaced them with any other published list of criteria that might serve as broad guidelines at least to filmmakers.

The consequence is that producers may feel justified in complaining that "the rating game" today is essentially a "guessing game" as to what determines the difference, let us say, between an R and an X or between a PG and an R. From our

point of view, were the standards for production still in effect, the majority of today's PG rated films could never have been so rated.

At one time it was also a practice of the Code and Rating Administration to provide producers with the opportunity of preproduction consultation on scripts in order to identify problem areas either with respect to eventual code approval or rating.

Although I believe the MPAA might rightly cite many instances in which producers abused this consultation process to their own ends, it nevertheless served the useful purpose, in our view, of providing producers with an early warning system that they would ignore at their own risk.

The purpose of these preliminary observations is not to evaluate the changes that have taken place in the code and rating program but to suggest that these changes do have a bearing on the question of the MPAA appeals board's mandate.

b. Conduct and procedures of the appeals board in New York City: Father Sullivan outlined the board's procedures and rules. He noted that each time there is an appeal, his office is notified by the MPAA:

When we arrive at the hearing, there is no requirement that we be formally introduced either to the appellant or to the members of the appeals board.

In practice, Mr. Valenti will frequently either acknowledge the presence of the observers or even introduce them to the appellant prior to the start of the screening. Since we know many of the industry people serving on the board, there will occur brief exchanges of greetings. As observers, we play no role except that of observation. We are present from the beginning of the screening through to the tabulation of the final secret ballot.

c. Opinion on the fairness of the appeals at which Sullivan's office has been present:

In general, this office is not aware of any intentional lack of fairness in the appeals board procedures or in the exercise of its function. It is our opinion that those who serve on the appeals board endeavor to be objective in their evaluation of the arguments presented both by the appellant and by Mr. Heffner.

Historically, there may have been an instance or two open to the charge of undue influence on the appeals board. "Ryan's Daughter," an MGM release which was rerated under the alleged threat by that studio of withdrawing its membership from the MPAA, is the best known example. To this day I believe it would be impossible to prove that the members of the appeals board were influenced by any other consideration than the merits of the film as they perceived it.

It is alleged that earlier this year, in the case of Warner's appeal of "All the President's Men," the studio had threat-

ened to cut off future Warners' product from those exhibitor members of the appeals board who would vote against overturning the rating.

In fact, the rating was overturned and "All the President's Men" was given a PG rating. Even if Warners had made such a threat, I can't see how they could have implemented it. The vote was, as required, by secret ballot.

Second, having heard the entire discussion, I would have to conclude that members of the appeals board voted in the light of the persuasive arguments offered by the appellant. Our office has learned that to forestall the possibility of any such pressure in the future the names of exhibitor members at a hearing will no longer be released prior to the hearing.

I would say parenthetically an example of where we brought to the MPAA concern on this question and they solved the problem as indicated.

Perhaps the objectivity of the appeals board is best illustrated by "Rollerball" and "Black Sunday." United Artists appealed the R rating for the former twice and Paramount appealed the R rating on the latter three times.

In each instance the appeals board sustained the R ratings in the face of forceful argumentation by the appellants. Whether the practice of multiple appeals of the same film is a good thing may be open to question.

In fact, the original provisions for the "code and rating appeals board" appear to rule out a second appeal. Provision 7(e) states: "The appeal shall be heard and decided as expeditiously as possible and the decision shall be final."

Granted the large investments involved in major motion pictures, however, there is little reason to believe that every semblance of undue pressure by major studios can ever be totally eliminated. Members of the appeals board, for their part, cannot live in isolation from the pressures ever present within the total motion picture environment of which each one of them is a part.

It has been the position of this office for many years that unless membership on the appeals board is opened to include distinterested third parties with no direct relationship to the motion picture industry—for example, representatives from parent organizations—the impartiality of the appeals process cannot be absolutely guaranteed.

At issue is not just the objectivity of the present appeals process but its perceived credibility in the eyes of the public.

d. Charge by independents that major studios are given more lenient ratings:

In the 9 years since the appeals board has been in existence the ratings of 85 films have been appealed. Of these 85 films, 56 were products of major studios and 29 were films of independents.

Thirteen of the major studio films were rerated; 11 of the independents received new ratings. Translating these figures into percentages, it emerges that 38 percent of inde-

pendent films submitted to an appeal were rerated, whereas only 25 percent of the major studio films had successful appeals.

These statistics may suggest that the appeals board has been more receptive to appeals from independents than the major studios. Yet, in our view, small independent producers do labor under certain handicaps in the appeals process.

First, there is frequently a lack of familiarity on their part with the appeals process itself. Many times they do not seem to know how to make an effective presentation. Major studios, on the contrary, are intimately familiar with the procedures and the fact that they have had long associations with members of the appeals board may create from them something of a psychological advantage.

Second, if there appears to be a disparity between the ratings assigned to major studio and independent films that contain similar subject matter and treatment, the difference is frequently traceable to another source.

When independent filmmakers, having little access to the type of financial capital and creative talent available to major studios, introduce particularly violent or strong sexual material into a film, their lack of cinematic ability frequently results in an all too obvious grossness of treatment—however identical the value content of their films and those of the major studios may appear to be. Because the rating administration has tended to be preoccupied with visuals over thematic content, the technical “artfulness” of a film’s treatment by the majors, inevitably influences the board’s deliberations.

In addition, the fact that some independents have sought out the exploitation market to an extent the major studios thus far have not, may also contribute toward more restrictive ratings being applied to their films.

The appeals board—and I would emphasize this point—will not be lenient on a film that could be the object of legal action or widespread public criticism.

These observations are estimates on our part of the psychological environment that an independent faces in the appeals process. In our view, however, there is no hard evidence that the members of the appeals board exercise any systematic or deliberate discrimination against independent producers and distributors.

e. Financial value of a PG as opposed to an R rating:

There have been no researched studies on the relationship between the various MPAA ratings and box office receipts. There is some question regarding whether such an analysis is even possible.

The current distributor preference for the PG rating springs from what one assumes to be the logical connection between the unrestricted PG rating—“unrestricted” in the MPAA sense—and larger audience potential.

At the same time, it is evident that young adult audiences, who make up the largest segment of moviegoers, seem to be put off by the alleged “blandness” implied by the G rating,

and, also, perhaps by the PG rating. Hence, another reason for a producer's preference for a PG rating.

According to Variety's yearly report on film rentals, two of 1976's top three grossing films—"One Flew Over the Cuckoo's Nest" and "The Omen"—were R rated. In addition, two of the top three box office successes of all time—"The Godfather" and "The Exorcist"—were also R rated.

Such statistics, however, can be misleading. The preponderance of financial successful films are still found in the PG category. Of the 25 top-grossing films for 1976, for example, 15 were rated PG.

The conclusion seems to be that the R rating will not handicap a genuinely entertaining film; on the other hand, films with PG ratings appear to account for the lion's share of box office dollars.

Viewing the ratings purely from a financial perspective, the sale of theatrical motion pictures to television is a particularly significant factor. In a statement before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the U.S. House of Representatives, Mr. Alfred R. Schneider, vice president, American Broadcasting Co., Inc., testified:

"We will not telecast a film rated R. But we will edit such films and require that such films be resubmitted to the Motion Picture Association of America for reclassification in terms of its judgement, and on the basis of our editing. If the MPAA feels that our edits would have made the picture presentable theatrically with a higher rating than R, such as PG or G, we will then accept it for telecast."

Sales to television are commonly structured into initial cost-profit projections for theatrical motion pictures and, consequently, since the income potential from television can be significant, the caution with which the networks approach R-rated films is a matter of serious concern to film producers.

f. Conclusion of Father Sullivan's statement:

To our knowledge such pressures upon the appeals board have not, to date, resulted in any pattern of discrimination against independent film producers, nor is there any evidence that the board succumbs to outside pressures or systematically favors the product of major studios.

To forestall the semblance or future possibility of discrimination, we strongly recommend that the Motion Picture Association of America institute the following procedures to insure the objectivity and credibility of the appeals board process:

First, membership on the board of appeals be opened to responsible, disinterested, nonindustry participation selected from parent-teachers' organizations and the professions.

Second, independent producers unfamiliar with the appeals board process receive more appropriate information prior to the appeal of their films as to the manner and substance of the process. It would also be helpful if the MPAA published the criteria that the code and rating administration actually employs.

Third, appellants be limited to a single appeal for each film brought before the board.

A final comment I would like to make, distinguished members of this subcommittee, is that in submitting this testimony, I do so in response to the invitation of your chairman; but, second, I would like to insist that we are still dissatisfied with the quality of the ratings as they are applied to motion pictures and I have so stated in our evaluation published in The February 1, 1977, issue of the Film and Broadcasting Review.

Our principal concern is with the PG rating and its relationship to parents and their responsibilities to children.

2. *Witness Davidson*

Kenneth H. Davidson is a staff assistant with the House Committee on Small Business. Mr. Davidson considers himself a student of the media. At the outset of the subcommittee investigation, Mr. Davidson offered his assistance. His research and knowledge of the cinema was in evidence throughout the hearings. Davidson described some substantive research he did for the investigation in this way:

At best, rating movies is a subjective business. Consequently, investigation into this area means gathering data based primarily on individual impressions by people involved with the system. The purpose of this testimony is to establish a more concrete data base for the committee's consideration.

At the outset of this project, committee counsel Steve Lynch and I determined that two questions should be considered: One, are non-MPAA members discriminated against or are MPAA members given unfair advantage by the rating system; and two, are some ratings more economically lucrative than others?

Are non-MPAA members discriminated against or are MPAA members given unfair advantage by the ratings system?

Since 1968, 4,054 films have been processed through the rating system. MPAA members account for 1,460 features or 36 percent and non-MPAA members account for 2,594 features or 64 percent. This means that nonmembers had 28 percent more production through the system than did MPAA members.

Two ratings, PG and R, account for 3,093 of total features or 76 percent.

Looking at the PG classification, we find that members accounted for 692 or 46 percent of those films while nonmembers received 804 or 54 percent of that rating classification.

In the R classification, members had 419 or 26 percent of the features while nonmembers had 1,177 or 74 percent of the features. . . .

Comparing member and nonmember total output—and when I say total output I mean 36 percent and 64 percent. Comparing those two percentages, 36 and 64 percent respectively, by the PG and R categories, in the PG category, MPAA members gained 10 percent of the ratings over their total output of 36 percent. In other words, comparing that

46 percent with the 36 percent, that is a plus 10 in the PG, which is not a restricted rating. Whereas nonmembers lost 10 percent—54 percent as opposed to 64 percent output—in that PG rating.

In the R, or more restrictive, rating, MPAA members lost 10 percent—26 percent as opposed to 36 percent—whereas nonmembers gained 10 percent of the R's—74 percent as opposed to 64 percent of the total output.

For the 1976 breakout, MPAA members had 24 percent total output and 43 percent of the PG's, which means they gained 19 percent in that comparison. The members had 39 percent of the R's—a gain of 15 percent.

The nonmembers had 57 percent of that year's PG's as opposed to 76 percent total output, which means they lost 19 percent. In the R category, they had 82 percent for a gain of 6 percent over total output.

Summary for question 1:

In reflecting on these figures, one finds that MPAA members would seem to have an edge in getting the less restrictive PG rating, as well as eluding the more restrictive R; whereas, the nonmembers seem to have difficulty in obtaining the less restrictive PG, but little difficulty in picking up the more restrictive R. It would appear that the subcommittee may wish to discuss this question with Messrs. Heffner and Valenti.

	MPAA member	Percent of ratings classification	Non- member	Percent of ratings classification	Total of ratings classification	Percent of total ratings
MPAA ratings 1968 to present:						
PG.....	693	46	804	54	1,497	37
G.....	311	43	416	57	727	18
R.....	419	26	1,177	74	1,596	39
X.....	37	16	197	84	234	6
Total.....	1,460	36	2,594	64	4,054	
1976:						
PG.....	65	43	85	57	150	31
G.....	13	21	49	79	62	13
R.....	38	39	176	82	214	44
X.....	2	3	58	97	60	12
Total.....	118	24	368	76	486	

Are some ratings more economically lucrative than others? Davidson used the all time rental champ list to compare ratings categories. His findings seem to confirm Valenti's Law.

Of the over 700 titles on the Variety "All-Time Film Rental Champs" list, 252 were released from 1970 through 1976. Those film rentals totalled \$3,040,423,576. PG's and R's accounted for 78 percent of the number of features and 83 percent of total rentals.

The first glance at the chart gives the impression that PG's are far more lucrative than R's. PG's outnumber R's by 1.6 to 1. In terms of rentals, however, the gap closes.

PG produces 48 percent of the number of films on the list while accounting for 49 percent of the rentals. R's accounted

for 30 percent of the number of features while producing 34 percent of the rentals: plus 1-percent rise for PG's against a plus 4-percent for R's.

Dropping down to nonmember production, which is the second chart down, PG produced 23 percent of that total while R's accounted for 21 percent. In terms of rentals, however, PG's accounted for 20 percent while R's maintained 21 percent, a 3-percent drop for PG's against R's no-gain/no-loss. In terms of so-called "big box-office films," the other two ratings, G and X account for less than 25 percent of the number of features and 18 percent of rentals.

Point one: In terms of making what Variety considers "big rentals," the chances are 1.6 to 1 that a PG picture will make it on the list as opposed to an R. R's on the other hand tend to make more money.

Point two: A subjective interjection.

The current runaway hit "Star Wars" was the subject of an article in a recent Daily Variety. The article said the producers when given a choice between G and PG, chose PG, the stated reason was that the film contained some scenes that would tend to frighten young viewers. Variety claims that the producers feared a G might give the film an "uncool image" among teenagers.

The hearing record to date includes at least two examples of producers who desired a PG because of what they felt would be a financial advantage over the R's they were assigned. In the "Black Sunday" case, Paramount vigorously appealed and lost their bid for a PG. "All The President's Men" by Warners went on an extensive public relations campaign and won a PG. This would tend to show that many producers feel a PG is of greater financial value, yet these figures don't necessarily seem to support that conclusion. Instead, they tend to show that in terms of this particular list—the minimum level of which is \$4 million—a film with a PG has a better chance of making the "big bucks." However, if an R makes it to this particular list, the chances are that it will do better at the box office.

MOVIE RATINGS AND RENTALS 1970-76

Film and rental totals				Film production and rental percentages			
No. films	Rental	No. non-MPAA films	Rental	No. films	Percent of total	Rental	Percent of total rental
PG	120 1,477,554,000			120	48	1,477,554,000	49+1
G	48 474,046,000			48	19	474,046,000	16-3
R	76 1,025,470,000			76	30	1,025,470,000	34+4
X	8 63,353,450			8	3	63,353,450	2-1
Total	252 3,040,423,576			252		3,040,423,576	
Comparison of non-MPAA to total production				Non-MPAA production and rental percentages			
No. films	Rental	No. non-MPAA films	Rental	No. films	Percent of total	Rental	Percent of total rental
PG	120 1,477,554,000	11 62,692,000		11	23	62,692,000	20-3
G	48 474,046,000	24 170,460,000		24	50	170,460,000	54+4
R	76 1,025,470,000	10 67,623,000		10	21	67,623,000	21
X	8 63,353,450	3 16,378,450		3	6	16,378,450	5-1
Total	252 3,040,423,576	48 317,153,450		48		317,153,450	

E. JULY 21, 1977, IN WASHINGTON, D.C.

1. *Witness Heffner*

Richard D. Heffner is the chairman of the Classification and Rating Administration. Currently, Mr. Heffner is also a professor of communications and public policy at Rutgers University. He also produces and moderates the program "Open Mind," which appears on WPIX-TV in New York.

In his opening statement, Heffner discussed his personal philosophy as chairman of CARA and defended the fairness of the ratings process:

I was asked to chair the rating board, then, not because of a connection to the film industry—one doesn't exist; I'm an outsider—but rather because of my lifelong involvement with Americans, with American life and thought both past and present, with some sense of Americans' historic aspirations and expectations and their relation to the media. And also—though some put it even more harshly—quite frankly because I'm just too old and weathered to be pushed around, impressed, cajoled, or pressured into making rating decisions that are not appropriate.

My colleagues and I apply ratings only as we truly are led to believe they reflect parental attitudes. Nothing more. Nothing less.

We make mistakes. But our mistakes are clearly the product only of our own fallibility, not of venality, not of concession to pressure. The pressures on us are great, to be sure. The important question, however, is: Do we give in to them? And the answer is—plainly and simply—that we do not.

So that we really should not have to take responsibility—here or in the press—for those who make headlines by charging that we have discriminated against them when they do not get what they want, any more than we should be made to take responsibility for those who may make even bigger headlines by hinting that they have charmed, finagled, inveigled, bought or sold us, when they do get what they want.

Headlines, of course, are the name of the game. But, like my colleagues, I cast my vote only as I believe it should be cast, exercise my leadership role on the rating board only as I believe the congruence of public interest and private interest commands.

From time to time industry people do not agree with what we do. But when personal disappointment about a particular rating abates, when pique and anger subside, most responsible industry people—not all, of course, but most of them—will concede that while we may operate in a way that occasionally pains them, we do so evenhandedly, out of neither fear nor favor, and in a way thoroughly consistent with our responsibility to classify with a concern not for box office, but for parental opinion.

In our effort to meet that responsibility, we have thus far enjoyed the support of most of the industry leaders in produc-

tion, distribution, and exhibition who had the foresight and discipline to create this ingenious system of self-regulation 9 years ago.

They have enabled me, for instance, to keep my own most solemn promise, the only one I would make, not to dissuade the film industry, of course, but to serve it only at that crucial juncture at which its long-range interest in creative freedom from governmental controls intersects precisely with the public interest, particularly with American parents' strongly felt need to be adequately enough advised about the wide parameters of motion picture content so that they can make their own judgments concerning their children's moviegoing, and not be forced instead to abandon that responsibility to yet another governmental agency.

As I understand your hearings, the question before this Subcommittee on Special Small Business Problems is whether the rating board has gone about its task in a fair and nondiscriminatory manner. Your question is whether we classify films submitted by small business in precisely the same way we classify films submitted by big business, measuring them all against precisely the same definitions of G, PG, R, and X. My answer, loud and clear, is unequivocally yes.

No filmmaker or distributor is treated any better or any worse, any differently at all, than any other filmmaker or distributor, big or little, rich or poor. There are no friends or foes, no favorites or unfavorites, when it comes to rating films.

But I assure you, under oath, the one you have administered to me and, more importantly, my own, that never, ever, during my 3 years as chairman of the rating board, have major studios been treated better than independents, as far as our ratings are concerned.

There is one criterion, and one criterion only, that guides our actions in relation to each and every film brought before us. It is best stated in the form of a question: Will most—not will any, a few, or some, but will most—American parents think this film most appropriately classified G, PG, R, or X?

We may be wrong in our answer to that question in relation to any one particular film. We are human. Our educated guesses may be wrong. And there is no way of totally eliminating the element of subjective human judgment from this process. There is no way of thoroughly operationalizing our judgments, only our procedures. No one has yet devised a means of classifying films by infallible machines, rather than by quite fallible human beings.

The board had classified 4,300 films as of the end of last month. And surely mistakes have been made. I am painfully, acutely, aware of some, and I know there must be others. But our many, many right ratings, as well as the several wrong ones, have all been applied fairly and squarely, without discrimination between big guys and little guys.

Later in his opening statement, Mr. Heffner discussed allegations made at earlier hearings issue by issue:

(1) You ask first why "Dogs" was given an R rating while several other films involving animal violence were given PG. My answer is quite direct: The animal violence in "Dogs" seemed to us to go beyond what most parents would accept in PG. In the other films you mention it did not.

In their entirety, no two films are exactly alike. But films are rated in their entirety. And because elements that have appeared in one film rated PG may surface again in another, quite often considerably embellished, does not mean that the other must be rated PG as well. That would make a mockery of our entire system. It is not the way we operate.

The real questions we must raise in rating individual films necessarily include: What elements do we find in them? How are they presented? To what extent? In what context? Along with what other elements? Most important of all, we must ask ourselves: What is the sum total of these parts in this particular picture? Does this picture add up in such a way that parents will likely think PG is its appropriate rating, or R?

Our answer about "Dogs" was simply that given the nature of its continuing treatment of a certain kind of animal violence, in our judgment most parents would want the film to be rated R, would want to know that when their younger children see "Dogs," they would have to be there with them, to lower somewhat the kids' anxieties about Rover and Spot at home.

Films derive from creative individuals, all of whom treat violence, sex, nudity, language, and all other content quite differently. We must classify their films differently, too, always depending upon their probable perception by American parents. I am attaching to this testimony my appeals board statement concerning "Dogs."

(2) You ask why the Humane Society is allowed to sit in on rating board sessions. It is not. Screenings, yes, but I assure you that no one outside of voting members of our board sits in on our rating sessions. No one.

(3) You ask me to explain the rating process involved with Earl Owensby's movie "Dark Sunday." To this day Mr. Owensby maintains that "Dark Sunday" received an X from CARA. It did not. Maybe you would think it should. But it did not—ever—although that misstatement has been repeated here, in the press, on the air, almost as if repetition would make it so.

On June 16, 1976, "Dark Sunday" was seen by the rating board in Hollywood. I was in New York at the time. There was strong sentiment for an X; there was also sentiment for an R. Because there was that division, and because my colleagues know that I feel we must be very much concerned with violence on the screen, I was called, told about the situ-

ation, and arrangements were made for me to screen the film in New York. I could not get to Hollywood at that time because of a pending appeal. It is under such or similar circumstances that I screen films in New York.

Meanwhile, because he inquired, Mr. Owensby was told that the board had not yet come to its conclusion, though there was very strong sentiment for an X, which was precisely, though only provisionally, the case. But "Dark Sunday" was never rated X, for I was to see it before any final decision was made, as is always the case when there is a tie or a close division of opinion among my colleagues on the rating board.

On June 23, 1976, I saw the film in New York. It is tough, and it is packed with graphic violence, but not, I thought, violence that added up to an X. I thought we should opt for R, instead. As soon as I could get back to Hollywood, therefore, my colleagues and I had a lengthy, appropriately heated discussion on the matter. We voted, and I was able to call Mr. Owensby and tell him that we had classified "Dark Sunday" R, not X. We issued an R certificate on June 29, 1976, hardly a sign that we were discriminating against Mr. Owensby, as charged.

But the fact, of course, is that Mr. Owensby did not want the R rating, he wanted a PG. And I guess that is why we are here. You may not yet have had the advantage of seeing "Dark Sunday" as the rating board did, when it voted for an R, rather than an X; or as the appeals board did, when it upheld the R rating. Therefore, I am attaching to this testimony my statement to the appeals board in which I conveyed the reasoning behind our R rating for this Owensby film.

(4) On another subject. You ask me whether I have spoken to Mr. Van Schmus concerning Jonathan Dana's testimony about alleged encouragement to appeal "Sandstone." I have done so. Not, I assure you, to see if Mr. Van Schmus had perpetrated the terrible deed. But rather to make absolutely certain that indeed he did, in the instance of "Sandstone"—and, like me, does in the instance of every other controversial, disputed rating—point out that the rating board in Hollywood is by no means the final rating authority, and that anyone and everyone has the absolute right to make a timely appeal from our rating judgments.

I would consider Mr. Van Schmus derelict in his duty if he did not pointedly inform disgruntled film people about their right to appeal, and about the fact that our judgments are reversed as well as upheld by an appellate body made up of industry persons—their peers, not outsiders like us. Mr. Van Schmus did inform Mr. Dana of his right to appeal. He did not encourage him, however; that is Dana's exaggeration. Nor did he suggest that Dana would prevail. No one familiar with the rating system who saw that original "Sandstone," to which Dana himself had applied an X, would or could have suggested that. If you see it, you will see why.

(5) Thus far your questions have had to do with charges that the rating board has discriminated against the little filmmaker-distributor.

Now you ask about the charge that I personally discriminated on behalf of a very little guy, that I alone changed his advertising seal, that I showed favoritism to him because I admire what he does and told him I knew he would not do anything "untoward," whatever that means. Let me assure you that I have never met this self-appointed "favorite" of mine. And his charge against me is nonsense, a total untruth—though quite successful at garnering continuing publicity for Robert Radnitz.

I changed no advertising seal for Radnitz, not by myself or with anyone. I could not have if I had wanted to. For, as I told him at the time on the telephone, "the advertising code is totally separate from the Classification and Rating Administration" and has its own director, Ms. Bethlyn Hand. I have absolutely nothing to do with advertising.

Besides, Radnitz' charge that I favor him is as false as it is grandiose. We do not rate the producers of G and PG films above the producers of R and X films. Or below them. We do not rate them at all.

I am attaching to this testimony a letter to Variety detailing how false Radnitz' charges about me are. He has replied that I would have felt differently about his testimony if I had only read it for myself. The fact, of course, is that I had very, very carefully gone through his comments about me and had found no exculpatory remarks other than some nonsense about my being "honest," "serious," "extremely intelligent," and, of all things, "young."

(6) You also want to know my response to a recent trade article which claims that Twentieth Century Fox demanded a PG instead of a G for "Star Wars." My response is simple: It is a great trade story, certain to get even more publicity for a great picture. But please do not make us responsible for that sort of business. We have enough real problems.

Twentieth Century Fox did not "demand" a PG. We voted PG for "Star Wars." just as we vote every G, PG, R or X, whatever a filmmaker may want or not want. I am glad Fox liked its PG rating. But that is not why we applied the PG. We do not give ratings on demand, not to big guys, or to little guys. If we did, I think any fair-minded person would find it pretty hard to explain why we are always being hassled over ratings—by big guys as well as by little guys.

(7) Next, you ask exactly what our guidelines are for rating films, since the classification system has done away with the rigidly absolute standards of the old production code, which had to be followed to the letter or a filmmaker did not get a seal of approval, and perhaps could not find an audience. The genius of the rating system, of course, is that nothing is approved or disapproved, just classified.

There are no exact lists of inflexible PG do's and don'ts, R do's and don'ts. They might look good on paper. But in the real world they would only irrationally constrain the concerned, responsible filmmaker, while irresistibly tempting his opposite numbers to work ever harder to find ways to violate the spirit of such rules, if not their letter.

We live in a creative community, after all, where fantastic energies can be expended on making A appear to be Z. Or X appear to be G, or at least PG, or maybe R.

There is the so-called automatic language rule that does require the rating board to give any and every picture an R if it contains just one of the harsher, sexually derived words, even used as an expletive. But with that single exception there is no pretense that all of one kind of film content, all violence, all nudity, all language, all sex, or all of what have you, must go into one classification, rather than another.

That would be unrealistic, a denial of the nature of contemporary films and their audiences. To do so would be to impose an insensitive, unreasoning and unworkable rigidity upon the art of filmmaking. One, incidentally, that would never and should never be accepted by the film producers, distributors, and exhibitors who voluntarily make up this much more flexible system in which reasonable judgments, not unreasoning absolutes, necessarily prevail.

Essentially, then, our rating guidelines are to be found in the very definitions of our rating symbols: Films that most American parents will likely consider appropriate in theme and treatment for even their youngest movie-age children, are rated G. Films that most American parents will likely think children under 17 can attend alone, but require parental guidance, are rated PG. Films that most American parents will likely think a child under 17 might see only if accompanied by a parent, are rated R. Films that most American parents will likely consider simply too adult for children under 17—18 in some States—are rated X.

More specific indications of what film content generally takes a picture from G to PG, from PG to R, or from R to X are found on pages 8 and 9 of the overall description of film classification that Jack Valenti offers in his report, "The Movie Rating System." CARA sends out Mr. Valenti's statement to all film people who feel the need for more detailed information about ratings, as well as to the press and the public. I am attaching it to my testimony for your convenience.

(8) You ask: If we can decide that a film is PG, why can't we issue a public statement explaining why the film is rated PG? The feasibility of giving such information is now being considered.

(9) You ask my response to research which indicates that independents have gotten two R's for every PG received, while the reverse is true for the major studios. We cannot classify films with an eye to such statistics, not if we continue to consider our only real constituents to be American parents.

Even if those numbers were more dramatic, or, indeed, if they were reversed, my basic response to such a question would have to be the same: The majors and the minors alike set their films before us. We do not write them. We do not produce them. We do not direct them. We only classify them. We only identify with our rating symbols the general level of their content for the use of American parents.

We are messengers. We bring parents a message about film content, tell them where we think they will think that content fits on our rating spectrum of G, PG, R, and X. If independents bring us all PG-ratable films, all of their films will be PG. And if the majors bring us all R-ratable films, all of their films will be R. As messengers, we only reflect what is in the films brought to us. We cannot do more. We should not do less.

(10) You ask me whether producers should not be limited to one appeal. I ask you to note that the appeals board is totally separate from and independent of the rating board of which I am chairman. I must appear before it as an advocate. And I feel it would be inappropriate for me to comment on its rules and procedures.

(11) You ask me if small independent producers have enough information about the rating system. Most of them seem to, but clearly the more information we can provide them, the better the system will work. We certainly encourage everyone to learn more about what our rating procedures are, particularly the right of appeal from our judgments.

(12) You ask why a producer is not allowed to refer to other films during an appeal. My reply as a participant in 31 appeals over the past 3 years is to assure you that just about every appellant I have seen has referred to other films. There does not seem to be any prohibition against doing so.

(13) You ask what percentage of the Nation's exhibitors adhere to our classifications. I really do not know. I am told NATO's estimate is 80 to 85 percent.

(14) You ask whether we ever check to see if producers are sending out prints of the versions of their films that we have actually seen and rated. When we are alerted to the possibility of a disparity between the version we have rated and the prints actually screened in the theaters, we try to check and to take appropriate action. Otherwise, as workers in a voluntary system, we must depend upon the honor and integrity of those who participate in it.

(15) You ask my response to the contention that major studios are allowed to wage unfair economic battles in support of an appeal. I do not believe that it is any responsible person's intention to allow anyone—major or minor—to do anything unfair in appealing a picture's rating.

(16) You ask how many members of the present rating board I have appointed. None. The one apprentice member I appointed has served her year and has moved on to a career in broadcasting.

(17) You ask whether I am allowed to make my own appointments to the rating board without consultation with any MPAA officials. Since Mr. Valenti, as the rating system's founder, has been assigned the task of overseeing CARA by its constituent groups—NATO, IFIDA, and MPAA—I will of course, always consult with him when appointments are to be made, but not with other MPAA officials. CARA is administered by MPAA; it is not part of it.

(18) You ask if I favor unlimited terms for board members and the board chairmen. I do not. But I do appreciate the importance of consistency in film ratings—as well as movement with the times. And I know that having the same people around for more than a brief period does foster that consistency.

(19) You ask how many times in the last year I have gone to Los Angeles to view films. I spent all of last July and August viewing films with my colleagues, except for brief appeals sessions in New York. Also, in the past year I have made 23 trips of varying lengths to Hollywood.

The chairman, as he had in earlier hearings, again expressed his belief that certain rating information should be provided to the public.

Mr. Russo. Let me ask you this. In question 8 you say the feasibility of giving information out is now being considered. My problem is that when you make a decision on whether something is PG or R, I mean, there are certain things that you decide on, that make you arrive at that decision. I do not quite understand why you cannot furnish that information to the public. You do not tell the parents what is in the movie. PG by itself does not tell them that. I think one of the things the hearings have developed, although this is not in the pure scope of the hearing, unfortunately or fortunately, is that there is not adequate information about why the film has been rated G or PG.

It could be violence or sex or language. I have something here that we have looked at—Jack Valenti sent a memo to critics about it. I was wondering why the code could not do the same thing that the critics do, basically specify what the reason is. For example, Vincent Canby of the New York Times says:

“Buffalo Bill and the Indians or Sitting Bull's History Lesson. The film has been rated PG for reasons that I would think have to do with language. There is little real violence or nudity. Silent Movie.—The film, which has been rated PG, contains some visual vulgarisms of the sort that small children find pricelessly funny—such as the sight of a wooden merry-go-round horse doing what live horses do naturally. Murder by Death.—The film has been rated PG. Naughty language did it.”

I just think maybe the code ought to do something like that rather than leave it up to the critic. You view it, so you should

be able to make the determination as to why it is that way. What is the big problem with your doing that?

Mr. HEFFNER. As I noted, that is precisely under consideration, as I understand, by the policy review committee.

During the questioning, majority counsel told Mr. Heffner that a PG film, "Sorcerer," was playing in a Washington theater. Counsel asserted that the film contained the four-letter word that supposedly guaranteed an R rating. Mr. Heffner said that could not be the case. As a result, after the hearing concluded, Mr. Heffner had the print in question pulled from the theater. He then viewed the film with the counsel and another committee staff member at MPAA headquarters. It turned out that the word in question was a word that sounded similar to the forbidden word.

This issue is, of course, merely a symptom of the larger problem. Counsel who saw the movie swore the word originally was there. Apparently, this was due to the similarity in sound between the two words and the impression that the character "mouthed" the word. Also, the scene was taken in context with the rest of the film, which contained several other vulgarisms. The New York Times critic said of the film: "Sorcerer, which has been rated PG, contains rather more bloody violence than one is likely to see in other PG movies these days." The Washington Post critic commented, "One cannot help wondering if 'Sorcerer' was awarded a PG rating before or after it was screened." This again highlights the subjectivity of ratings.

Counsel then discussed with the witness the range of age covered by the PG category:

Mr. LYNCH. We have had several witnesses bring up the subject of the PG classification, and the problem is the age of some of the children covered in that one category. Do you see a problem with that category, that the age covers so many children?

Mr. HEFFNER. Yes; but I have been impressed that when polls are taken about the usefulness of the rating system there is such a strong majority that indicates the usefulness of the rating system which clearly is a sign that whatever problems there are, the rating system seems to work more, rather than less.

Mr. LYNCH. Well, sticking with that then, have you yourself personally done, or has the board done, any research that determines what film content is acceptable to American parents?

Mr. HEFFNER. Most of the information—and it is a terribly important question you ask—comes from exhibitors who stand at the exit of the theater when the picture is over and hear what it is that parents are saying. These exhibitors get the comments of the parents. The chairman of the classification committee, Julian Rifkin, is quick to pass on to us comments that he picks up. And generally the exhibitors do provide us with much of what we know about parental reactions. Again, the public opinion polls would seem to indicate

in the wide parameters that the classification system covers that, its usefulness is ascertained by most parents.

Heffner also explained CARA's budget :

* * * generally we work out the budget in terms of the projected income, in terms of the classification categories, in terms of what we anticipate the number of films will be in the year to come. We receive no funds from outside, from MPAA, or any other source. The funds upon which we work and create the budget have to do with the fees that are paid by all people who bring films to us, except for those times when we waive a fee for a producer or distributor who has a problem.

2. *Witness Valenti*

Mr. Jack Valenti, president of Motion Picture Association of America, was the final witness to appear before the subcommittee. Mr. Valenti told the subcommittee that the best measure of a system is how long it has existed and how well it has served. The rating system has survived for 9 years. Poll soundings have usually been about 2 to 1 in approval. Valenti maintains the credo of the system, "Keep it simple, as simple as you can." New categories could be added and age limitations could be narrowed, but would this not just make things even more complex?

As for handing out information on a rating :

So, when you try to make explanations about what the film is, how do you tell the public the degree of what the picture is about? I have asked newspapers of the country to do that for two reasons. One is if we had to buy the space to do it, it would break the producer of a picture. You cannot buy space and put an explanation in an ad. It would ruin the ad, and I cannot buy the space in the newspaper.

So I have suggested to the public what Arthur Sulzberger of the New York Times instituted in the New York Times as a readers' service. He is a disinterested person from the rating system, and he can make any judgment he chooses. Let the critics say to parents, as a service to readers, let me tell you what is in this picture. Now, to me, that is the best way to do it.

The second best way is to have exhibitors themselves who have seen the picture instruct their cashiers as to what to answer because it is different in every locality. I know if I ran a theater in my hometown in Houston I might look at a picture in a different context than an exhibitor in Manhattan. I have a different clientele, and they have different mores and customs that guide the social conduct of the family.

So maybe in Houston exhibitors might have more to say about the picture in one context than in New York City. I am trying to answer this question before it is even asked because it has come up twice, the question of supplying additional information. The policy review committee, at this time, is looking to find out first, how to do it? Second, if you can do it, how do you disseminate it? And third, how do you make sure that what you say accurately reflects what is in that picture to the vast totality of that land?

The chairman followed up by asking Valenti if he did not think there was a problem with a PG category that includes both "Star Wars" and "Sorcerer." Valenti responded:

Mr. VALENTI. Yes; I think there is a problem there, Mr. Chairman. And I think a lot of people would like to know more about a picture. What we tell people to do is read the reviews, ask your neighbor, call the theater, read Parents magazine, read the Catholic and Protestant newsletters, all of those varying opinions as to why that picture got a particular rating. We have found it difficult for the rating system itself to be the sole transmission belt of that information. We found it very difficult. But that one question is one that we have been wrestling with for some time.

Mr. Russo. My concern, Mr. Valenti, is that I think you do not want Government regulation in this particular area. I do not believe in censorship, but I believe it is very important that the parents can do whatever they have to do. I do not think they do as good a job as they should. They want the movie theater and the television sets to be their babysitter. I do not condone that, but by the same token if we are going to have the self-regulating system that we have here, I think the foundation of that system, in order to make sure that it succeeds, is that it does not give in to political pressure.

Certainly, the Government gets involved in particular problems. We cannot have the ideal world. I understand that. We cannot have a leaflet made by the producer saying that is what we ought to do, or here is what the problem with the movie is. Let us disseminate it to everybody. That is an ideal situation, but it is not practical. We can at least have a system that gives movie information.

For example, PG movies such as "Star Wars" do not have all that much violence in the movie. But there are some scenes in there. My son thought it was terrific. But you could just give it a PG, and there really is not a tremendous amount of problems with "Star Wars." "Sorcerer" is a different movie. It has some really stiff scenes in there, a head decapitated and a lot of blood and guts. Now, that could have been rated PGV, because there is violence in that movie. This throws the ball back into the parents' lap. They can call the exhibitor. They can check the critics. At least they have been put on notice, a PG "Star Wars" and a PG "Sorcerer" does not tell me anything that is wrong with "Sorcerer," if there is anything wrong. I could go see both movies and come to completely different conclusions. "Star Wars," to me, could be a bloody outer space movie which it really is not.

Mr. VALENTI. Let me respond to that, because you put your finger on one of the problems that affects this whole issue. If we use the system PGV, that would be the way that we would designate both "Sorcerer" and "Star Wars," because you have to say there is galactical violence in "Star Wars" and there is violence in "Sorcerer."

So a parent who is looking at "Star Wars" and "Sorcerer" is seeing the same PG and the same V on it. I think this creates a problem. We are trying to give more information, but we are being inaccurate in the information that we give to a parent simply by the designation.

Mr. Russo. You are more accurate at that point than you are with a strict PG rating of "Sorcerer" and "Star Wars." For example, take another movie that has been rated PG because of language. That has a completely different reason. I am just raising these things because I know we cannot get the ideal world. I would not want to give up just because we cannot give them all the information we think is necessary. But we ought to give them more than they are getting now. That is the confusion you have when you have your independent producers complaining.

My concern, I have told you throughout the hearings, is that I am not going to have hearings to look into this particular system so that we can make it easier for people to get PG ratings. I do not want anyone to get that impression. We want everyone treated fairly. I think the record will substantiate what this means as a result of our hearings, but I do not want anyone to get the impression we are trying to make it easier for someone to get a lesser rating than he deserves, whether he is a small or large producer.

We have gotten off the track because we started talking about a movie rating system, and you get into how something is rated. Believe me, from my contacts on the Communications Subcommittee hearings that I heard, it seems that there is a public outcry. You know how sensitive political figures are to public outcries. I hate to see a "good" system get turned into a bad system.

Mr. VALENTI. I want to say, Mr. Chairman, I want you to know that myself and my colleagues have been fully impressed with the seriousness with which you and your subcommittee have undertaken this. Particularly this problem you have put your finger on as to more information. We do not want to leave with you thinking that we have discarded that. We are looking now at what we say, how we say it, and how we disseminate it. That is being investigated very carefully right now.

I am hopeful that soon—I cannot say when—we will have additional information that we could give to the public.

Later in the hearing, Valenti discussed the question of MPAA membership. This came up as the result of Valenti's stand against a private foundation handling a rating system. Valenti said:

No, it ought to be done by the people in the industry who understand it and who love the industry and want to make it proper and survive and serve a public need.

In contradiction to what some believed, membership in MPAA is not closed. Valenti would like more members. He pointed out, however, it would be useless for an independent producer to join because

films are distributed through the member companies. The membership of MPAA extends itself to marketplace problems, foreign problems, etc. The distribution segment of the industry is expensive and risky.

As for the general guidelines used in rating films:

Mr. VALENTI. The last study the MPAA did was done by the Daniel Yankelovich Co. in 1967, which was a department motivation study of the entire movie industry. It did not shed a great deal of light on what the American public finds acceptable because it is very hard to pin somebody down. A person would say, I do not like violence, but what does that mean?

The second study that we have done is the Opinion Research Corp., but it is not a department motivation study at all. So as of this moment what we are doing is, we have read all of the current data and the current work done by social scientists in this area. Then this is applied to the criteria that Mr. Heffner and his people use.

I suppose you would say that it is just good commonsense of what the average parent might think. But beyond that we have not gone.

The chairman discussed with both Heffner and Valenti the issue of economic pressure on an appeal.

Mr. RUSSO. I would like to ask Mr. Heffner a question. A tremendous amount of economic pressure was put to bear on "All The President's Men." It was appealed. It received an R rating and it went to the appeals board. We asked the question do you think such pressure is fair. I thought your answer to that question avoided the specific question.

The point is, in fact, that Warner Bros. mobilized something that an independent producer could not mobilize in getting all of that public pressure from the Nation, from religious fields, political fields, and other leaders to send in this type of information to the appeals board. I think that is unfair. Just per se it is unfair.

Your rating board should be looking at it as it does every other film. The appeals board looks at the film and looks into your argument and makes a decision. I think an independent is put at a tremendous disadvantage if he cannot mobilize the forces. Maybe an independent would have produced "All The President's Men" but did not have the financial capability or contacts in the field of politics and religious areas and educational areas to put this pressure on. Yet a major was able to do it. I think it is unfair, and I do not think it is a system that ought to exist in the appeals process. They should make the determinations based on what you say, what the owner says, and what the film says.

Do you think it is fair or unfair for someone to be able to mount that type of pressure?

Mr. HEFFNER. I was not trying to avoid——

Mr. RUSSO. I am not saying you did it intentionally. I would just like more explanation.

Mr. HEFFNER. In one instance you had a producer whose name was Robert Redford who came before the appeals board and presented the case for his film. It was an advantage that you surely would not take away from "All The President's Men" because Robert Redford happened to have been the principal person. Yet it gave "All The President's Men" an enormous advantage, but it was an advantage that comes from real life. I guess I have to reply to you by saying that what did it for "All The President's Men" was the picture.

I sincerely, absolutely, completely believe that. If I had been a member of the appeals board, I would have voted the same way that the majority voted.

Mr. Russo. That may be the case, but based on what happened it would be very difficult to make that determination. I can see how an independent producer can feel really disadvantaged in that particular situation. What I am saying is that probably it would be a problem for the appeals board to look at.

We understand if Robert Redford walks in as the producer of a film that he is no different from Jonathon Dana. He happens to be a big famous star and he happens to have that going for him. But Jonathon Dana never gets the religious figures and the political figures to do what Robert Redford was able to do. It is a fine line to draw, but that is what concerns me—the small businessman who does not have the contacts yet he wants to deal fairly in the marketplace.

I cannot prevent all the problems, like the inherent problem of Robert Redford walking into a room. I can understand that. But that is certainly bringing a lot of pressure to come to bear in the appeals board that should not be there. It is not something that is going to be accepted. That puts the small independent producer at a disadvantage.

Maybe I am not explaining it enough. To me Robert Redford walking into a room has an effect on the appeals board but it is nothing compared to the effect that all that stuff has on the appeals board member who keeps getting inundated from letters from the Catholic Conference. He gets like 50, 60, or 70 letters.

Mr. VALENTI. Let me speak to this. Mr. Heffner's responsibility does not go to the appeals board. He appears before it. I think it would be very difficult to say to an independent if he called and said, I would like to bring a friend of mine who is a professor of social science at New York University to this hearing to help me explain this picture. I think I would be hard put to say, "I am sorry, we do not do that. We do not allow anybody but just the producer." I would find, Mr. Chairman, that you would be limiting, I believe, an intrinsic right of somebody's appearing before even a quasi-judicial body of bringing forth any evidence that he has.

Mr. Russo. I am not saying that, Mr. Valenti. I am not talking about him bringing somebody else to the appeals board. I am talking about the economic implications shown by "All

The President's Men" when they mobilized that campaign as compared to someone like Mr. Dana.

Mr. VALENTI. I would like to respond by saying, How would you draw a rule? That is the problem. Would the rule be that you can only have one or two persons or that you cannot send out letters? I am saying, administratively, how would you draw the rules that you would allow even the humblest independent to bring in friends that might testify without charge for him.

Mr. RUSSO. Are you asking me to give you what I consider the answer to that?

Mr. VALENTI. Yes, sir.

Mr. RUSSO. Simply, you allow a certain amount of people to appear at the appeals board, but you do not allow outside communication, written or otherwise, to be sent to the appeals board members. Therefore, if a person wants to bring a Ph. D. in to explain the content of a film a major producer can do the same thing. But the imbalance is who can mobilize outside forces from other fields, for example, education, religious, et cetera.

Mr. VALENTI. You are worrying about mail to the appeals board beforehand?

Mr. RUSSO. Contacts made by the outside to appeals board members.

Mr. VALENTI. Before the appeal itself?

Mr. RUSSO. Yes.

Mr. VALENTI. Well, that is one way to do it. I am not sure it would achieve the goal that you want, because actually you are talking about 22 people to whom these missives are sent. So, it is not a lot of money involved in having that sent.

Mr. RUSSO. It is not a question of having a lot of money. It is that a major producer has many more contacts in these particular areas than the independent does based only on the size and the impact that it has on the industry. A Twentieth Century Fox or a Universal Studios may have a heck of a lot more more contacts out in the business community of the United States of America. A heck of a lot stronger than Jonathon Dana, who may well write a movie like "Star Wars" or some other great movie but could not mobilize the Nation behind him to get a change in the rating of the appeals board.

Mr. HEFFNER. I am trying desperately to remember an appeal in which a picture was at issue that had been produced or was being distributed by a smaller, independent person in which he did mention or refer to a number of people who had seen the picture. In fact, I was going through my notes the other day. Jonathan Dana referred to the fact that Max Lerner and several other people had seen the picture. I think what Jack is suggesting is very correct.

If he had brought in letters from Max and other people, would you have said, you cannot do that, recognizing the unfairness that seems to prevail when someone has more

resources than someone else? Still, if you were trying to legislate or order on the part of the appeals board or the policy review committee, do you not have to run into other kinds of unfairness? Would it not have been inappropriate to say to Dana—

Mr. RUSSO. I do not know any law we have ever passed in this country or any rule that does not discriminate against somebody somehow. The point is you try to cut down the amount of inequities that there are. What a major producer can mount with that outside pressure is really something that I think ought not to continue.

Mr. HEFFNER. I would just like to say, as a person who is always on the other side of the fence during the appeal, my concern is only two things. That the picture be shown, because I think that is what does it; and that I be allowed to offer the few words that I have that illumine why the board did what it did. Given those things, I am not terribly concerned about 200 letters or whatever.

Mr. RUSSO. But your board rated "All The President's Men" R.

Mr. HEFFNER. Exactly.

Mr. RUSSO. You probably voted the other way.

Mr. HEFFNER. If I were a member of the appeals board, I would have done what they did. Yet, I made a strong statement at that appeals board. That is my job, and I did it. I think the fact of the matter is, however, that there was fairness.

They saw the picture, and they saw what it had to say.

Mr. RUSSO. I would venture to say there would be very little teeth to the argument that there was outside pressure if there wasn't all that mail sent in before they saw the picture and if they just heard the producer and yourself make the pitch. But, I don't want to belabor the point.

Mr. VALENTI. I think you made your point pretty solidly. I have got it.

Finally, the issue of advertising trailers was discussed again.

Mr. LYNCH. I just wanted to go back to an issue we raised with Mr. Heffner before. We have been told on a couple of occasions, about trailers. As I understand it, there are two types of trailers, red and green. One trailer is supposed to be a tame trailer aimed at G and PG audiences, and the other is for R and X.

I think our concern is that we have been told on occasion that an audience at either a G or PG film may well see a trailer, although it may be a tame trailer—in other words, a G trailer, but that trailer is an advertisement for an R or an X film.

Mr. VALENTI. Yes; that is true.

Mr. LYNCH. Can that happen?

Mr. VALENTI. Yes, sir.

Mr. LYNCH. Well, I think our concern with that is, why is that allowed to happen? If you have an audience who is

geared in the G and PG category, the children are being exposed to an advertisement which seems wonderful to them. Their natural reaction is to go home and tell their parents, I want to go see this movie.

Mr. VALENTI. I have two comments. First, we have to assume that the theater is not filled just with children. That is, children are being taken by their parents, so there is an audience out there for that particular film that is being advertised.

Second, the trailer itself is devoid of any offensive material. At least we hope that is so, in order to qualify for the G or PG audience. The trailer has to be sanitized, and all offensive material or that which we think would offend parents is deleted.

The producer does that voluntarily. If he does not do it, his trailers are not given the imprint saying it is approved.

I will voluntarily tell you where I think we might have a problem, and we are going to do something about it. That is, X-rated pictures that have a sanitized trailer. I think that is something we are looking into now. But we are really looking, Mr. Lynch, at the trailer, whether or not there is anything in that trailer that is offensive.

Mr. Russo. I guess Mr. Lynch's point, Jack, is that although a trailer is not offensive, what it is doing is pumping up people out there to come and see a movie that they are really not an audience for, or may not be an audience for.

I always get back to the old theory if the parent doesn't watch what his kid is doing anyway, a rating system doesn't have an effect.

After the conclusion of the subcommittee's hearings, MPAA issued a clarification statement. It contained a change in the PG category. Formerly, the category contained a warning for preteenagers. The new definition covers all children.

RULES AND PROCEDURES GOVERNING VOLUNTARY MOVIE CLASSIFIED SYSTEM ARE CODIFIED

A statement of the procedural rules governing the motion picture industry's voluntary classification program for children was released today by the heads of the three organizations which sponsor the nine-year-old rating system. It is effective August 1.

"The rules, adopted when the rating program went into effect on November 1, 1968, have been changed since that time by only occasional amendments. Now they are brought together with clarifying amendments and in integrated form for ease of understanding", said an accompanying statement.

The statement of the formal codification was made jointly by Jack Valenti, president of the Motion Picture Association of America; Marvin Goldman, president of the National Association of Theater Owners; and Jerome Pickman, Louis Mishkin, and Joseph Brenner of the Board of Governors of

the International Film Importers and Distributors of America.

A redefinition of the PG category will read as follows: "PG—Parental Guidance Suggested. Some material may not be suitable for children." This strengthens the PG rating by indicating that parents should exercise guidance concerning PG films for ALL their children, not just pre-teenagers.

No changes were made in definitions in the other three categories which remain: "G—General Audiences. All ages admitted." "R—Restricted. Under 17 requires accompanying parent or adult guardian." "X—No one under 17 admitted." (Some states may have higher age limits.)

A Policy Review Committee consisting of four representatives from each of the three sponsoring organizations determines the policies, rules and procedures of the Classification and Rating Administration (CARA), which designates the ratings, and the Rating Appeals Board, which hears appeals to change a rating on a specific film. This Committee is the governing body of the entire system.

That period during which a motion picture must be withdrawn from domestic distribution before CARA will reclassify it is extended from a 60-day period to a 90-day period, but this period may be shortened or lengthened in exceptional cases by a new Waiver Committee comprising three representatives each from MPAA, NATO and IFIDA.

Procedures are established for revoking a rating because of its misuse, with one representative each of MPAA, NATO, and IFIDA to be designated to make such a determination.

The new rules place qualified limitations on the number of appeals which may be taken to the Rating Appeals Board from the classifying or re-classifying of a motion picture.

The restated appeals procedures again made clear that it is impermissible for an appellant to speak about an appeal to a member of the Appeals Board, other than chairman, prior to the hearing of the appeal.

V. FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

A. DISCRIMINATION IN THE RATING SYSTEM

This was the complaint of some independent producers which prompted the hearings. The subcommittee found no evidence whatsoever of any discrimination against independent productions by the rating system. What was evident to the subcommittee was the existence of a great deal of misunderstanding and confusion over how the process operates. There also appears to be some dissatisfaction with the PG category among the various segments of the motion picture industry.

It was pointed out at the hearing that as of June 15, 1977, only 85 films had been appealed. Over 4,000 films have been rated. Of the appealed films, 56 were major studio films and 29 were independent productions. Thirteen of the major films and 11 independent productions were rerated. So actually independent productions have fared slightly better in the rerating policy.

Throughout the hearings, the subcommittee received testimony on the philosophy of a rating system and the subjectivity of the various rating categories, but there was no evidence whatsoever that some productions are favored over others. Some problems have developed as they do in any system which is fairly new and unique, but they have been dealt with as they arose. The most recent example of this is the change in the appeals process.

"All the President's Men" had received an R from the rating board because of the presence of the four-letter word which guarantees an automatic R. Warner Brothers then launched an intense public relations drive to have the film rerated to PG. As was pointed out by the chairman in the hearings, an independent producer often lacks the funds and/or connections in the academic world, for example, to launch a similar drive. As a result, the MPAA subsequently decided that they would no longer release the names of exhibitor members appearing at an appeal. This should forestall the possibility of any type of mass pressure in the future.

MPAA president Valenti pointed out that membership in his organization is not closed, as some people had indicated. There also are obviously no impediments to independent producers forming their own organization. Any filmmaker has the ultimate power needed—a good film. Testimony, especially from exhibitors, indicated that everyone is crying out for more and better films. Each year the number of films dwindles. As a result, the major studios often concentrate on hoped-for blockbusters such as "Jaws" or "Star Wars." This leaves an open field for independent productions to attempt to garner impressive box-office receipts. The opportunity is there.

B. HOW A FILM IS RATED

It is hoped that a result of this investigation will be a better understanding by all interested parties of exactly how a film is rated. Confusion over the process was especially prominent, for example, in the testimony of witness Owensby.

A rating board located in Hollywood assigns ratings to new films. There are seven members on the board. One of the members is the chairman (currently Richard D. Heffner). It is his responsibility, among others, to state the reason for the board's rating before the appeals board. (It should be noted that the chairman does so whether or not he voted for the rating in question.) MPAA officials have no role in rating discussions, nor do they interfere or overrule board decisions.

A producer is not forced to submit his film for rating; however, most choose to do so. This is because approximately 85 percent of the Nation's exhibitors participate in the system and enforce ratings. Pornographic movie producers do not submit their films. Rather, these producers self-apply an X. The G, PG, and R symbols are registered with the U.S. Patent and Trademark Office; thus, no one who has not submitted a film may use them.

Board members view each film and after discussion vote for a rating. Each member completes a rating form indicating his or her reasons for the rating in four categories—theme, violence, language, and nudity and sex. A majority vote decides the rating. The producer then has the right to ask why. He may re-edit and try the process again for a less severe rating. Only when a certificate is issued by the board is the rating final.

If a producer is still dissatisfied, he or she may appeal. The appeals board meets in New York City and is comprised of 22 members—men and women from MPAA, NATO, and IFIDA. (Monitors from various religious organizations are allowed to be present at appeals.) They act as a quasi-judicial body. After they view the film, the producer of the film is allowed to explain why the film deserves a different rating. The chairman of the rating board then explains the reason for the assigned rating. The producer may offer a rebuttal. After questioning and discussion, a secret ballot is taken. A vote of two-thirds of those present is required to award a new rating. This decision is final and cannot be appealed, although the appeals board can grant a rehearing upon request.

A policy review committee oversees the rating board. It meets quarterly and monitors board activity. This committee and the appeals board are set up so that no single industry element may control the system.

Film advertising is also controlled by the rating process. For a trailer for an R- or X-rated film to be shown with a G or PG film, the trailer must be edited to conform with the rating of the film being shown. A G trailer can be shown with all films, and an R trailer only with R or X films.

C. THE VALUE OF THE RATINGS

Most films receive either a PG or an R rating. Industry statistics and subcommittee study indicate that one can make money with either

rating, although some producers believe a PG is more financially beneficial. Statistics also indicate that, generally, X and G films do not fare that well at the box office. Since many fine films do receive a G rating, this raises several disturbing questions concerning audience preference as well as parental control of their children's viewing habits.

Although the rating board rates films for various reasons, these are not made public, other than at an appeal. In their reviews, some film critics comment on why a film got the rating it did. Also, some family magazines attempt the same thing. While this is the opinion of others rather than the raters, there does not at the present time appear to be wide consumer dissatisfaction. As violence, language and sexual connotations continue to move into the PG category films, this may change.

On January 30, 1978, the National Association of Theatre Owners announced a nationwide poll of their members. Exhibitor feelings on the accuracy of ratings vis-a-vis content, rating credibility, and the rating comprehension of the public are among the issues being sampled. The results of such a survey could prove to be beneficial, since in the final analysis it is at the box office where such subjective questions can best be answered.

D. WHAT THE RATINGS TELL US

From the outset the purpose of the rating system was to provide advance information to enable parents to make judgments on movies they wanted their children to see or not to see. Basic to the program was and is the responsibility of the parent to make the decision.

Throughout the hearings, Chairman Russo probed the issue of what assistance ratings provide to the Nation's parents. If a film has received a PG, what in the film is deemed unsuitable for some children? Certain film critics and some column writers do make an attempt to present their opinion on why a film received a certain rating. How useful is this, though? For example, the New York Times said about one film, " * * * contains some violence but young children will probably fall to sleep long before anything untoward is shown on the screen."

The advance information a rating gives is merely a set of guidelines. There is no information beyond this. What type of violence is there in the film? What type of language is used? A parent has to do a lot of reading and expend a lot of effort to find these things out. Why?

A suggestion was made that new ratings could be added, such as PGV for violence. MPAA officials objected, saying that this would complicate a very simple system. They may be right. In addition to this, the V would indicate the presence of violence, but not what kind.

Another suggestion proposed distributing a note of explanation at the theater. Cost factors and the fact one would already have to be at the theater obviously are serious faults with this idea.

The big question remains—why can't the raters explain their rating? They already do when they fill out cards listing their reactions to a certain film at the original rating screening. Why are they unable to make this information public?

At the present time, the MPAA is considering various ideas in this area. The subcommittee encourages any new attempts at providing more information to the public.

E. THE STATUS OF THE SMALL FILM ENTREPRENEUR

As with any industry in modern-day America, the lot of the small guy is not an easy one. Financing is hard to come by. The film industry is unique, however. Federal regulation is not an obstacle as it is to just about every other industry. The ratings system has done a good job of heading this off.

In addition to this, films are in demand. On several occasions in the last few years, films have become financial bonanzas with little preappearance publicity. People saw a film and liked it. The word spread and the turnstile spun. Good films are in demand by the Nation's exhibitors. The opportunity is there. As with any business, there are risks, but for those willing to take the risk, success stories abound.

F. AVAILABILITY OF INFORMATION ABOUT THE SYSTEM

It was evident throughout the hearings that all independent producers did not have a complete knowledge of the rating system. While some knew the basics of how one submits a film, the actual steps of the process were not very clear. The subcommittee hopes that a reading of this report, its appendixes, and the printed hearings will provide any and all information anyone—producer or moviegoer—may need.

In addition to this problem, there appears to be an information gap on what effect the content of motion pictures has upon the Nation's children. While the MPAA has done research work on what film content is acceptable to parents, children have been overlooked. The subcommittee urges the MPAA to consider new research in the area of how film content affects a substantial proportion of moviegoers—the Nation's children.

G. RECOMMENDATIONS

Traditionally, at this point in our committee reports we make recommendations to various federal agencies concerning the findings of our investigations. In this instance, the Subcommittee found that claims of discrimination were unfounded and, therefore, no such recommendations are called for.

Concerning the issue of public information about the rating system, the Subcommittee has expressed its impressions after reviewing all the testimony. However, since the Motion Picture Association of America is a private organization, marketplace events determine the usefulness of their rating system and the system's compatibility with the viewing requirements of the nation's various localities.

APPENDIXES

APPENDIX 1.—FILM CLASSIFICATION FEE SCHEDULE

Effective January 1, 1977

C.A.R.A. FEE

Check appropriate category:

FILM CLASSIFICATION FEE SCHEDULE

Check appropriate category:

Class I-A	Negative cost* \$15,000,000 or over	\$8,000.00 ()
Class I-B	Negative cost* \$10,000,000 to \$14,999,999	\$7,000.00 ()
Class I-C	Negative cost* \$5,000,000 to \$9,999,999	\$6,000.00 ()
Class I-D	Negative cost* \$3,000,000 to \$4,999,999	\$5,000.00 ()
Class I-E	Negative cost* \$1,500,000 to \$2,999,999	\$4,000.00 ()
Class I-F	Negative cost* \$1,000,000 to \$1,499,999	\$3,000.00 ()
Class I-G	Negative cost* \$500,000 to \$999,999	\$2,700.00 ()
Class I-II	Negative cost* \$150,000 to \$499,999	\$2,000.00 ()
Class I-I	Negative cost* \$75,000 to \$149,999	\$1,100.00 ()
Class I-J	Negative cost* less than \$75,000	\$ 800.00 ()
Class I-K	Short Subject (any film less than 3,000 feet in length)	\$ 80.00 ()

*Negative cost shall include a reasonable amount for the salaries and other charges of those compensated on a participation basis.

II *To be used only by distributors whose aggregate domestic gross film rental for the prior calendar or fiscal year was less than \$2,000,000, and where the distributor has neither been involved with production activities nor participated in the financing of production.*

Class II-A	Acquisition cost* \$300,000 or over	\$1,200.00 ()
Class II-B	Acquisition cost* \$200,000 to \$299,999	\$1,100.00 ()
Class II-C	Acquisition cost* \$100,000 to \$199,999	\$1,000.00 ()
Class II-D	Acquisition cost* \$50,000 to \$99,999	\$ 900.00 ()
Class II-E	Acquisition cost* \$25,000 to \$49,999	\$ 825.00 ()
Class II-F	Acquisition cost* less than \$25,000	\$ 800.00 ()
Class II-G	Where acquisition of rights is on a "straight distribution deal" which is arranged only after the completion of the film in which <u>no</u> cash payments or guarantees are involved	\$ 800.00 ()

*Acquisition cost includes cash payment and/or guarantee.

III *ReIssue*

Any film released prior to November 1, 1968 that has not previously been rated and that is submitted for rating prior to its ReIssue.

Class III-A	Negative cost \$1,000,000 or over	\$1,750.00 ()
Class III-B	Negative cost \$500,000 to \$999,999	\$1,500.00 ()
Class III-C	Negative cost \$150,000 to \$499,999	\$1,250.00 ()
Class III-D	Negative cost \$75,000 to \$149,999	\$1,000.00 ()
Class III-E	Negative cost less than \$75,000	\$ 800.00 ()

IV *ReRating*

Any film previously rated by this office which is submitted for ReRating after it has been placed in distribution, shall be charged a review fee in the amount of RR — \$ 800.00 ()

Submitted by: Firm Name _____
Address & Telephone _____

Person to contact with reference to advertising material, all of which must be submitted in accordance with paragraph 8(A) on front page:

Name: _____

Address & Telephone _____

I hereby certify that, to the best of my knowledge, the above information is accurate for this film.

(SIGNED) _____ (title) _____

APPENDIX 2.—MEMBERSHIP OF THE CLASSIFICATION AND RATING ADMINISTRATION

THE RATING BOARD, MOTION PICTURE ASSOCIATION OF AMERICA,
HOLLYWOOD, CALIF.

Richard D. Heffner is university professor of communications and public policy at Rutgers and brings to his position as chairman of the rating board a vast amount of practical experience in communications and in an academic career.

A pioneer in public broadcasting, Heffner was instrumental in the controversial acquisition and activation of Channel 13, WNET, New York's educational television station, serving as its first general manager. In his earlier work in commercial television, he had produced and moderated "Man of the Year," "The Open Mind," and other prize-winning television program series, and had served as director of public affairs programs for WNBC-TV, Channel 4, in New York. He also was director of special projects for the CBS Television Network and editorial consultant to the CBS, Inc., editorial board, and served as a radio newsmen for ABC.

Beginning his career as an historian, Heffner taught at the University of California at Berkeley, Sarah Lawrence College, Columbia University and the New School for Social Research, New York. He is the author of "A Documentary History of the United States" and editor of Tocqueville's "Democracy in America". His reviews and articles have appeared in such publications as the New York Times, Saturday Review, and the American Historical Review.

Heffner has frequently served as an American specialist in communications for the U.S. Department of State in Japan, the Soviet Union, Germany, Yugoslavia, and Israel. He has assumed responsibility for a variety of other consultative projects in the field of communications and continues to moderate "The Open Mind", which now originates in New York and is rebroadcast on public television stations across the Nation.

A Phi Beta Kappa graduate of Columbia University, Heffner was born August 5, 1925, and is married to the former Elaine Segal, who is assistant in psychiatry at Cornell Medical School, and codirector of the nursery school treatment center at Payne-Whitney Clinic of New York Hospital. The Heffners have two sons, Daniel and Andrew.

Albert E. Van Schmus, administrative director of the rating board, was appointed in 1949 to the staff of the production code administration, predecessor to the rating board, after starting in production at RKO Radio Pictures in 1941. In 1942, he became an assistant director and received credits for four feature-length pictures before entering the U.S. Army Signal Corps in 1943, serving with a radar unit, assigned 1 year in the United States and two in the South Pacific. On his return to the movie industry in 1946, he received credits for two

more feature films at RKO, one at Republic Pictures, and seven at Enterprise Studios before joining the code administration. Van Schmus is a graduate of the University of Chicago School of Social Sciences. He is married and has two children. He is 57 years old.

Richard R. Mathison was appointed to the code staff in 1965, coming directly from his position as southern California bureau chief of Newsweek magazine, 1959-65. In 1942, he joined the U.S. Marine Corps, serving as an operations officer and commanding officer of a headquarters squadron in the South Pacific. Following World War II, he was a staff writer for Associated Press, and in 1947 became one of the founders of a California news magazine, *Fortnight*. From 1958 to 1959 he served as an editor of the *Los Angeles Times*. He has also written articles for many national magazines and is the author of four books. Mathison attended the University of Idaho and George Washington University, majoring in premed. He is 57 years old.

Richard McKay was appointed to the rating board in 1969. Son of a theater owner, McKay began his career as a film buyer for the Schine Theaters in Cleveland. He was a film buyer for Paramount Theaters (1940-52); publicity chief for Pacific Theaters (1952-56); and director of advertising and publicity for American International Pictures (1956-58). From 1958 to 1968, he served first as director of publicity and advertising and later as vice president of foreign sales for Walt Disney Productions. For 1 year before joining the Board he served as U.S. representative for London-based producer Harry Saltzman. McKay attended Fordham University and the University of Richmond, receiving a B.A. degree from the latter. At recent homecoming ceremonies Richmond cited him as an "outstanding alumnus" of the University. He has been honored by the University of Southern California, Loyola of Los Angeles, California State University at Northridge, the Claremont Colleges, and the University of Anahuac in Mexico City as a lecturer on various aspects of the motion picture industry. During World War II McKay served as an instructor in the Navy Air Corps. He is 60 years of age.

Janis M. Montgomery was appointed to the code and rating board in 1971. Prior to this she served as secretary to the late Geoffrey M. Shurlock, a former director of the code. In conjunction with this position she conducted research for the Motion Picture Association into the nature of film content. At one time Ms. Montgomery was employed by Columbia Pictures Corp. She attended San Diego State and Oceanside College majoring in Education. She taught school in Oceanside for 3 years. She is 48 years old and enjoys skiing, tennis, swimming and dancing.

Susan Nicoletti was born in Chicago but reared in a small town, Bradley, 60 miles south of Chicago. She entered Northern Illinois University as an English major with a theater arts minor. Her father, a chemist, was transferred to California in 1965, and she continued her education at Pasadena City College. A series of acting, speech, and music classes followed during which she worked part time for the Laemmle theater chain. She has worked for two independent film companies, as a legal secretary for Metromedia and KTTV, and after working as the secretary to the advertising director of the MPAA became a fellow on the boards in 1973. She is 29 and single.

Sandra M. Pinckney-Herbert is a graduate of Ithaca College, Ithaca, N.Y., with a bachelor of arts degree in sociology and anthropology. She presently is a candidate for a master of science degree in educational communications at the same institution. She also has studied at the University of Pennsylvania, Howard University in Washington, and the Sorbonne in Paris. Her career interests lie in commercial television for the present and eventually international educational communications. She is 28 and has a 3-year-old-daughter.

APPENDIX 3.—EXAMPLES OF VARIOUS RECENT FILM ADVERTISING

UNIVERSAL PICTURES,
Universal City, Calif., October 3, 1977.

Congressman MARTY RUSSO,
Committee on Small Business, Subcommittee on Special Small Business Problems, Rayburn House Office Building, Washington, D.C.

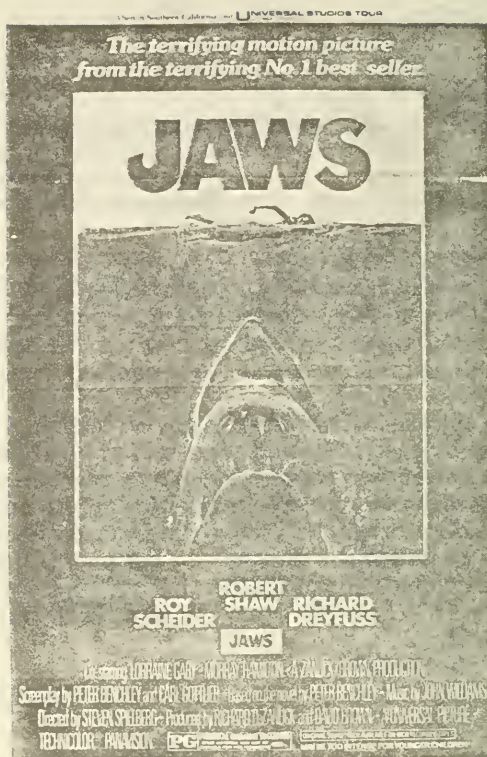
DEAR CONGRESSMAN RUSSO: I am responding to your letter to Universal dated September 26 concerning the special phrases that we have included in several of our motion pictures, i.e. "Jaws" and "Slapshot."

These phrases were added to the advertising on both of these films on a case-by-case basis and were self-applied because we felt an obligation to alert our potential audiences of certain material that may be either too strong or too intense for young audiences. Additionally, there was one other film, "The Andromeda Strain," which was rated "G" but we added the phrase "... but may be too *intense* for younger children." "The Andromeda Strain" was released in 1971.

I hope this answers your inquiry. If I can answer any further questions, I will be happy to do so.

Yours truly,

CHARLES M. POWELL,
Vice President.



K and DAVID BROWN • A UNIVERSAL PICTURE

ORIGINAL SOUNDTRACK AVAILABLE ON MCA RECORDS & TAPES

...MAY BE TOO INTENSE FOR YOUNGER CHILDREN

"THE FUNNIEST NEW COMEDY OF THE YEAR."

**"Uproarious as well as irreverent...
Like 'Rocky' it is a celebration of the
victorious underdog."**

©1987 Thomas, ASSOCIATED PRESS

PAUL NEWMAN IN

A GEORGE ROY HILL FILM



SLAP SHOT

Co-starring MICHAEL ONTKEAN • LINDSAY CROUSE
JENNIFER WARREN • GARY H. USER and STROTHER TILLOTSON
Written by MICHAEL W. BASS and LARRY F. ALLEN
Music Supervision: JEFFREY BERMAN • Music by GEORGE ROY HILL
Produced by ROBERT WUNSCH and STEPHEN FRIEDMAN
A PAUL PATTS PRESENTATION • A FRIEDMAN-WUNSCH PRODUCTION • A UNIVERSAL PICTURE • TECHNICOLOR

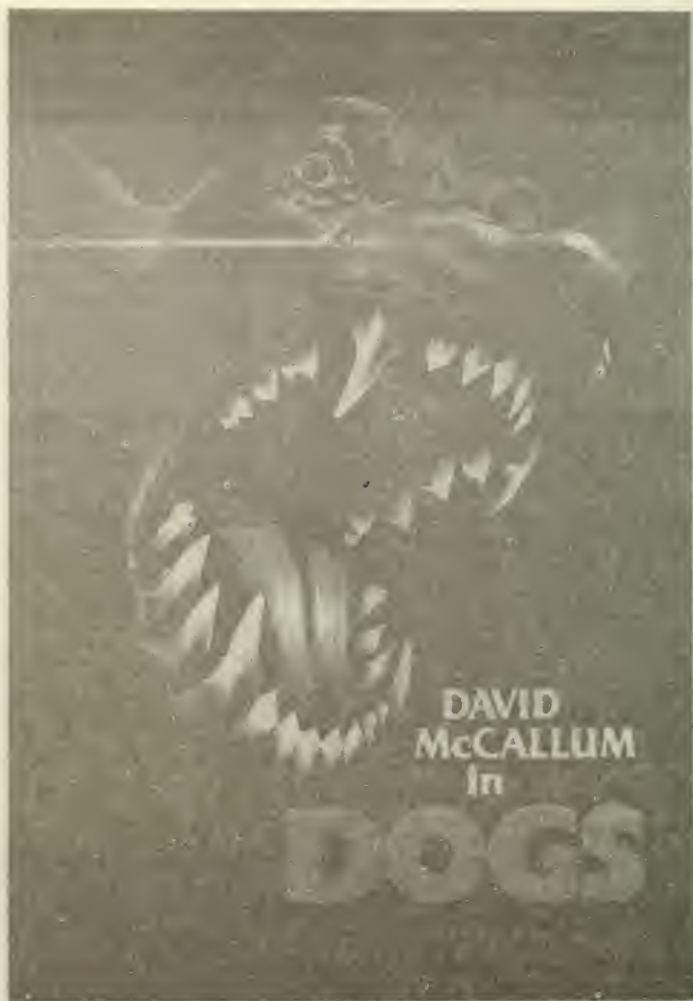
R RESTRICTED

CERTAIN LANGUAGE MAY BE TOO STRONG FOR CHILDREN

PRESENTATION • A FRIEDMAN-WUNSCH PRODUCTION • A UNIVERSAL PICTURE • TECHNICOLOR

R RESTRICTED

CERTAIN LANGUAGE MAY BE TOO STRONG FOR CHILDREN



DARK SUNDAY - IT SHOULD HAVE BEEN A LOVE STORY



IT SHOULD HAVE BEEN A LOVE STORY
DARK SUNDAY - DARK SUNDAY - DARK SUNDAY

Starring:
Earl Owensby
Monique Proulx
Phillip Lanier
Ron Lampkin

THE

MOTION PICTURE CO., INC.

MUSIC BY: A. C. Smith
WRITTEN BY: Howard Lee
DIRECTOR OF PHOTOGRAPHY: James H. Hansen
PRODUCED BY: Earl Owensby
DIRECTED BY: Phillip Lanier

APPENDIX 4.—RULES AND REGULATIONS OF THE CLASSIFICATION AND
RATING ADMINISTRATION

RULES AND REGULATIONS

OF THE

CLASSIFICATION AND RATING ADMINISTRATION

Classification and Rating Administration
8480 Beverly Boulevard
Hollywood, California 90048

August 1977

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RULES AND REGULATIONS
OF THE
CLASSIFICATION AND RATING ADMINISTRATION

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ARTICLE I POLICY REVIEW COMMITTEE

Section I. Organization

A. A Policy Review Committee is established to be comprised of representatives of the National Association of Theatre Owners ("NATO"), International Film Importers and Distributors of America ("IFIDA") and Motion Picture Association of America, Inc. ("MPAA").

B. Each organization shall have four representatives on the Policy Review Committee.

(1) The Chairman of CARA shall participate in all meetings as an ex officio member of the Policy Review Committee.

(2) Each organization shall have the right to have an additional person attend for secretarial purposes.

C. Attendance by eight members, exclusive of ex officio members, shall constitute a quorum, provided that at least two members are present from each organization.

D. The Chairmanship of the Policy Review Committee shall rotate among the President of NATO, a member of the Board of Governors of IFIDA and the President of MPAA.

E. The Policy Review Committee shall meet at least twice a year at times scheduled through consultation among the President of NATO, a member of the Board of Governors of IFIDA and the President of MPAA. Special meetings may be called as circumstances require through the same procedure.

ARTICLE I, Section I (Con't)

F. Minutes shall be kept and distributed to the members of the Policy Review Committee. Such minutes shall in all respects be confidential.

G. MPAA counsel, in cooperation with the Executive Director of NATO, shall serve as Secretary to the Policy Review Committee and shall be responsible for circulating minutes of the meetings and such other materials as the Policy Review Committee determines should be circulated.

Section II.Duties

A. The Policy Review Committee shall determine the policies, rules and procedures to be followed by the Classification and Rating Administration in the conduct of its duties.

B. The Policy Review Committee shall determine the policies, rules and procedures to be followed by the Classification and Rating Appeals Board and its subcommittees in the conduct of Appeals and other proceedings.

C. The Policy Review Committee shall have the authority to make changes in the Rating System and the policies, rules and/or procedures necessary for implementation. Such changes may be made on the Policy Review Committee's own initiative or on the basis of proposals from members of the Appeals Board, the Chairman of CARA or other appropriate sources.

ARTICLE II

CLASSIFICATION AND RATING ADMINISTRATION

Section I. Organization

A. A Classification and Rating Administration (CARA) is established.

B. It shall be comprised of a Chairman and staff members, one of whom shall be designated Administrative Director.

Section II. CARA's Duties

A. All motion pictures produced or distributed by members of the MPAA and their subsidiaries shall be submitted to CARA for rating.

B. All motion pictures produced or distributed by non-members of the MPAA may be submitted to CARA in the same manner and under the same conditions as members of MPAA.

C. The actual rating of a motion picture shall be made only upon the viewing by CARA of the completed motion picture. Solely at the request of the producer or the distributor of a motion picture, CARA may consult with them on rating criteria at any time before completion of the motion picture.

Section III. Rating and Re-rating by CARA

A. CARA will rate or re-rate any motion picture at any time before it is exhibited in any theatre in the United States.

B. CARA will rate or re-rate any motion picture if that motion picture has not been exhibited in more than four theatres for a period not exceeding thirty days. The thirty-day period shall commence with the first date of exhibition in any one theatre and run continuously therefrom.

C. CARA will re-rate any motion picture that has been exhibited and does not qualify under sub-section B above, only if any and all versions of the motion picture are permanently withdrawn from exhibition and all such versions are not exhibited or advertised anywhere in the United States for a period of 90 days prior to the date the re-rated version is re-released in exhibition. The 90-day time period may be changed in exceptional cases by the Waiver Committee as prescribed in Section III-H below.

ARTICLE II, Section III (Con't)

D. CARA will rate a motion picture released without previously being submitted to CARA at any time after release, provided it is submitted for a rating in exactly the same form in which it is in release. If the producer or distributor seeking the rating chooses to edit or otherwise revise the picture, CARA will rate the picture in accordance to Section III-C above.

E. CARA will rate any motion picture previously released with a self-applied X rating (or without a self-applied X rating, but under similar admissions policy) under the rules set out in Sections III B-C, except that if upon review CARA issues the motion picture an X rating, the producer or distributor submitting need not remove the motion picture nor certify that it has been removed from exhibition for the time period specified in Section III-C above.

F. CARA shall issue the Rating Certificate containing the rating or re-rating only after the producer or distributor who submitted the motion picture certifies that:

- (1) All prints conform identically to the version rated or re-rated by CARA and only such conforming prints shall be exhibited in the United States; and
- (2) The time period for which the motion picture must be withdrawn, if any, has been completed.

G. Motion pictures submitted for rating or re-rating shall be subject to the advertising approval procedures provided in the rules for the Advertising Code.

H. A Waiver Committee is established to be comprised of three members each from NATO, IFIDA and the MPAA. Upon the initiative of CARA or the producer or distributor of the motion picture, the Committee shall have the authority to hold a hearing and to decide either to lengthen or shorten the 90-day time period prescribed in Section III-C above.

- (1) Five members shall constitute a quorum, provided that at least one member is present from each organization. Each member shall have one vote and a majority vote of those voting shall govern.

ARTICLE II, Section III-H (Con't)

(2) The Waiver Committee shall have the final authority to set a time period of 90 days or less. If the Waiver Committee imposes a time period in excess of 90 days, the producer or distributor may appeal the decision to the Appeals Board.

(3) The Appeals Board has the authority to reduce the time period set by the Waiver Committee down to 90 days exactly, affirm the time period set by the Waiver Committee or modify the decision of the Waiver Committee to a time period of greater than 90 days but less than that imposed by the Waiver Committee. The procedures for such appeals are prescribed in Article III, Sections II and III.

I. For the purposes of determining the applicability of Section III A-F hereof, CARA or the Waiver Committee may require applicants to supply, in writing, all necessary and pertinent information.

Section IV.Rating Procedures

A. When the producer or distributor of a completed motion picture elects to release the motion picture with a CARA rating, it shall be submitted to CARA and rated either:

- (1) G - General Audiences. All ages admitted.
- (2) PG - Parental Guidance Suggested. Some material may not be suitable for children.
- (3) R - Restricted. Under 17 requires accompanying parent or adult guardian. (Age may vary in some jurisdictions).
- (4) X - No one under 17 admitted. (Age may vary in some jurisdictions).

B. The G, PG and R ratings set out above are Certification Marks registered by the MPAA with the United States Patent and Trademark Office.

- (1) The G, PG, or R ratings may not be self-applied.
- (2) The X rating may be self-applied by producers and distributors who are non-members of the MPAA.

ARTICLE II, Section IV (Con't)

C. In issuing the ratings provided in Section IV-A above, CARA shall consider as criteria among others as deemed appropriate the treatment of the theme, language, violence, nudity and sex.

D. A producer or distributor shall pay CARA a fee in accordance with the uniform schedule of fees.

Section V.Use of the Ratings

A. A rating is issued by CARA on the condition that all prints of a picture to be distributed for exhibition in the United States shall be identical to the print rated by CARA. The agents, assignees and other persons acting under the actual or apparent authority of the applicant are bound by this requirement.

B. A rating is issued by CARA on the condition that all the terms and conditions stated in the Rating Certificate are binding on the producer or distributor who submits the motion picture, as well as his agents, assignees and other persons acting under his actual or apparent authority.

C. Motion pictures of MPAA member companies rated G, PG, or R by CARA shall bear upon a prominent frame of every print distributed in the United States the number of Rating Certificate and the official Seal of the Association with the words "Certificate Number," followed by the number of the Rating Certificate and the symbol of the rating assigned to it. So far as possible, the Seal of the Association, the rating and number shall be displayed in uniform type, size and prominence.

D. Motion pictures of non-MPAA member companies rated G, PG, or R by CARA may bear upon a prominent frame of every print distributed in the United States the words "Certificate Number," followed by the number of the Rating Certificate and shall bear the symbol of the rating assigned to it. Prints of such pictures may also display the official Seal of the Association. So far as possible, the Seal of the Association and the number, if displayed and the rating shall be displayed in uniform type, size and prominence.

E. Motion pictures submitted for rating which are rated X, shall display the symbol X on all prints of the motion picture distributed in the United States in uniform type, size and prominence. The Seal of the Association shall not be displayed on a motion picture rated X.

ARTICLE II, Section VI.

Section VI.Unauthorized Use and Revocation

A. The use of CARA ratings without a duly issued CARA Rating Certificate is not permitted. In addition to the remedies provided in these rules, legal action may be instituted to prevent unauthorized use of the ratings.

B. Any producer or distributor issued a Rating Certificate who distributes the motion picture in violation of the terms and conditions specified in these rules or the Rating Certificate may have the rating revoked.

C. An action for revocation other than for a violation of the Advertising Code shall be commenced by CARA.

(1) CARA shall file a letter with the President of the MPAA stating the relevant facts on which the revocation is sought.

(2) A copy of the letter shall be sent to the producer or distributor and, where possible, be accompanied by telephone notice.

(3) In consultation with the President of the MPAA and the Chairman of CARA, a date and a time for a hearing shall be set to provide the producer or distributor an opportunity to be heard.

D. Hearings on revocation shall be heard by a representative designated by the President of the MPAA, a representative designated by the Board of Governors of IFIDA, and a representative designated by NATO. If, by majority vote, the three representatives of MPAA, IFIDA and NATO determine that the violation did occur, they may order the rating revoked and the Rating Certificate voided.

ARTICLE III

CLASSIFICATION AND RATING APPEALS BOARD

Section I .Organization

A. A Classification and Rating Appeals Board is established, to be composed as follows:

- (1) The President of the MPAA and nine representatives designated one each by the member companies of the MPAA.
- (2) Eight exhibitors designated by NATO.
- (3) Four distributors designated by IFIDA.

B. A substitute member for any appeal, to replace a regular member unable to attend, may be designated in accordance with the same procedures for selecting regular members.

C. The President of the MPAA shall be Chairman of the Appeals Board, and the MPAA shall provide its Secretariat.

D. The presence of eleven members is necessary to constitute a quorum of the Appeals Board for the hearing of the appeal, provided that at least four members each, designated by MPAA and NATO, respectively, and one member designated by IFIDA are present. Upon the unanimous concurrence of the Chairman of the Appeals Board, the representative of CARA and the representative of the producer or distributor taking the appeal, the quorum requirements may be waived.

Section II .Duties

A. (1) The Appeals Board shall hear and determine appeals taken by producers or distributors from an initial decision by CARA. The Appeals Board may affirm the decision of CARA or apply a different rating as it deems appropriate.

(2) Upon the request of the producer or distributor whose appeal received a majority vote, but less than a two-thirds vote and therefore did not overturn CARA's rating, the Chairman of the Appeals Board shall poll the members of the Appeals Board who voted on the appeal on whether a re-hearing of the appeal should be granted.

ARTICLE III, Section II-A (Con't)

a) Only one request for a re-hearing shall be entertained and that must be filed within fifteen business days after the date of the original appeal.

b) The producer or distributor may submit new information in support of the request for a re-hearing.

c) A majority vote of the members shall be required for a re-hearing to be granted and the decision shall be final. In the event of a tie vote, the Chairman of the Appeals Board shall decide whether to grant the re-hearing.

d) The re-hearing of an appeal shall be conducted under the same procedures as prescribed for appeals generally.

B. (1) After a motion picture has been initially rated or re-rated by CARA and such rating or re-rating sustained by the Appeals Board in the appeal provided for in Section II-A above, the producer or distributor may resubmit the motion picture to CARA for a subsequent re-rating one or more times, subject only to the fee schedule and rule requirements provided in Article II, Section III.

(2) The Appeals Board shall hear and determine appeals from decisions by CARA issuing a subsequent re-rating in accordance with the same rules and procedures provided in this article for appeals generally, except that

a) The producer or distributor shall be granted only one appeal on a subsequent re-rating as a matter of right. This appeal of right may be taken after the first or after any subsequent re-submission to CARA at the option of the producer or distributor.

b) The producer or distributor shall be granted additional appeals, after the appeal of right provided for in sub-section (a) above, only in exceptional cases and only with the express consent of the Chairman of the Appeals Board. The approval of the Chairman shall be granted only where the producer or distributor demonstrates that there is a substantial change in the motion picture giving the reasons why such changes were not made prior to the last appeal of right.

ARTICLE III, Section II-B (Con't)

c) When an appeal is sought pursuant to subsection (b) above, by a non-member of MPAA, the Chairman shall, at the request of the producer or distributor, consult with a member of the Governing Board of IFIDA in determining whether to grant the appeal.

(3) If a producer or distributor seeking an appeal pursuant to Section II-B-2 (b and c) is denied the right to take an appeal, such producer or distributor may have that decision reviewed by the President of NATO, the Chairman of the Board of Governors of IFIDA and the President of MPAA. A majority vote shall decide whether an appeal shall be granted and such decision shall be final.

(4) In determining the appeal rights of a producer or distributor under Section II-B, the grant or denial of a re-hearing of any prior appeal, as provided for in section II-A-2, shall be of no effect.

C. The Appeals Board shall hear and determine appeals from a waiting-time period in excess of 90 days imposed by the Waiver Committee pursuant to Article II Section III-C.

D. The Appeals Board or any member may offer proposals to the Policy Review Committee regarding the policies, rules or procedures of the Appeals Board, CARA, the Waiver Committee, or any other matter involving the Rating System. The final decision to adopt such proposals shall be made by the Policy Review Committee.

E. (1) No member of the Appeals Board shall participate in an appeal involving a motion picture in which the member or any company with which he or she is associated has a financial interest.

(2) Except as allowed in these rules, it shall be grounds for dismissal of the appeal or other appropriate sanction for the producer or distributor taking an appeal to discuss the subject of the appeal with one or more members of the Appeals Board, other than the Chairman of the Appeals Board, prior to the hearing of the Appeal. It shall be the duty of the member or members, contacted to inform the Chairman who shall rule on the sanction to be imposed.

ARTICLE III (C on't)

Section III. Appeals - Time for Filing

A. An appeal from a decision of the Waiver Committee on the time-period requirement provided for in Article II Section III-C may be made to the Appeals Board at any time during the time period originally established by the Waiver Committee.

B. An appeal from a decision by CARA may be filed at any time until the motion picture in question has opened at any theatre in the United States.

C. When the appeal from a decision by CARA involves a motion picture in exhibition, an appeal may be filed only with approval of the Waiver Committee. The producer or distributor seeking the appeal shall submit a letter, stating the reasons why the appeal was filed after the date of exhibition with a rating and providing the information required in Subsection D below. The decision of the Waiver Committee shall be final.

D. The Waiver Committee's consideration shall in part be based on:

- (1) The date upon which the motion picture was rated by CARA;
- (2) The date upon which the motion picture was first exhibited;
- (3) The number of theatres in which the motion picture has been exhibited, is being exhibited and is booked to be exhibited as of the dates upon which the appeal is filed and is to be heard, and
- (4) The nature of the advertising and extent to which the motion picture has been advertised.

Section IV. Conduct of Appeals

A. An appeal from a decision by CARA or the Waiver Committee shall be instituted by the filing of a notice of appeal.

- (1) The notice shall state the intention to appeal, the running time of the motion picture and certify that the print to be shown at the appeal conforms identically to the version rated by CARA.

ARTICLE III, Section IV-A (Con't)

- (2) The information required in Article III, Section III-D.
- (3) A check in the amount of \$100 made out to the MPAA.
- (4) The letter should be sent to the Chairman of the Appeals Board as follows:

President
Motion Picture Association of America, Inc.
1600 Eye Street
Washington, D. C. 20006

B. With the filing of an appeal, the producer or distributor taking the appeal shall be required to pay a uniform fee in the amount of \$100, said amount to be used exclusively towards the cost involved in scheduling and hearing of the appeals.

C. Appeals shall be scheduled no less than seven days after the filing of the notice of the appeal. In exceptional cases the executives of NATO, IFIDA and MPAA may modify this rule.

D. Provision shall be made for the screening by the members of the Appeals Board at the hearing or prior thereto of a print of the motion picture identical to the one rated by CARA.

- (1) The hearing of an appeal from a rating by CARA shall commence with the screening of the motion picture involved.
- (2) The hearing of an appeal from a time period decision by the Waiver Committee shall commence with the screening of the motion picture involved at the discretion of the Chairman of the Appeals Board.

E. The producer or distributor taking the appeal, CARA or the Waiver Committee may present written statements to the Appeals Board.

ARTICLE III, Section IV-E (Con't)

(1) If either the producer or distributor taking the appeal, CARA or the Waiver Committee desires to present such written statements to the Appeals Board, any such written statement should be furnished to the Secretary at least seven days before the date fixed for the hearing of the appeal. The Secretary will distribute such statements to the Executive Secretaries of IFIDA, NATO and MPAA for circulation to their respective members of the Appeals Board. If prior submission is not possible, the written statement shall be distributed at the hearing of the appeal.

(2) Submission of written statements shall not diminish or alter the right to present oral statements or arguments on behalf of the producer or distributor taking the appeal and CARA or the Waiver Committee.

F. The producer or distributor taking the appeal, CARA or the Waiver Committee may present oral statements to the Appeals Board at the hearing.

(1) The Appeals Board will hear oral statements on behalf of the producer or distributor by not more than two persons, except by special permission. Oral statements or arguments on behalf of CARA shall be made only by the Chairman of CARA or his designated representative and on behalf of the Waiver Committee by a member or a designated representative.

(2) On appeals of decisions by the Waiver Committee, the producer or distributor taking the appeal and the representative of the Waiver Committee may offer the oral testimony of two witnesses. Such witnesses shall be subject to questioning by the Appeals Board.

(3) The producer or distributor taking the appeal, the representative of CARA or the Waiver Committee shall be afforded the opportunity for rebuttal.

ARTICLE III, Section IV-F (Con't)

(4) Normally no more than a half hour will be allowed for oral arguments to the party taking the appeal, and a like time to CARA or the Waiver Committee. If a producer or distributor taking an appeal, CARA or the Waiver Committee is of the opinion that additional statements or additional time are necessary for the adequate presentation of the appeal, the producer or distributor, CARA or the Waiver Committee may make such request by letter addressed to the Secretary stating the reasons why such statements or time is required for the adequate presentation of the appeal.

(5) When such request is made by a non-member of MPAA, the Secretary shall consult with a member of the Governing Board of IFIDA in determining whether and to what extent the request may be granted.

(6) A request for the participation of additional persons or for the allowance of additional time, to the extent that it is not granted, may be renewed to the Appeals Board at the commencement of the hearing of the appeal for disposition by the Appeals Board.

(7) In no circumstances shall the time allowed to any producer or distributor, the Waiver Committee or CARA, for the hearing of an appeal, extend beyond one hour.

G. The members of the Appeals Board shall have the opportunity to question the producer or distributor taking the appeal and/or the representative of CARA or the Waiver Committee.

(1) The time for questioning shall not run against the prescribed time allocations.

(2) At the conclusion of the questioning the producer or distributor taking the appeal and the representative of CARA or the Waiver Committee shall leave the room in which the hearing is being conducted.

H. After a reasonable time for discussion, the designated members of the Appeals Board shall vote to either sustain or to overrule the decision of CARA or the Waiver Committee.

ARTICLE III, Section IV-H (Con't)

(1) No decision of CARA shall be overruled upon appeal unless two-thirds of those present and voting shall vote to overrule. Upon an overruling of its decision, CARA shall rate the picture involved in conformity with the decision of the Appeals Board.

(2) No decision of the Waiver Committee shall be overruled unless a majority of those present and voting shall vote to overrule. Upon the overruling of its decision, the Waiver Committee shall implement the time requirement set by the Appeals Board in accordance with the provisions in Article II, Section III.

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APPENDIX 5.—*Ginsberg v. New York*, 390 U.S. 629 (1967) ; *Tropic Film Corp. v. Paramount Pictures Corp.*, 319 F. Supp. 1247 (1970)

GINSBERG v. NEW YORK,

Syllabus.

GINSBERG v. NEW YORK

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT

No. 47. Argued January 16, 1968.—Decided April 22, 1968.

Appellant, who operates a stationery store and luncheonette, was convicted of selling “girlie” magazines to a 16-year-old boy in violation of § 484-h of the New York Penal Law. The statute makes it unlawful “knowingly to sell . . . to a minor” under 17 “(a) any picture . . . which depicts nudity . . . and which is harmful to minors,” and “(b) any . . . magazine . . . which contains [such pictures] and which, taken as a whole, is harmful to minors.” Appellant’s conviction was affirmed by the Appellate Term of the Supreme Court. He was denied leave to appeal to the New York Court of Appeals. *Held*:

1. The magazines here involved are not obscene for adults and appellant is not barred from selling them to persons 17 years of age or older. Pp. 634–635.

2. Obscenity is not within the area of protected speech or press, *Roth v. United States*, 354 U.S. 476, 485, and there is no issue here of the obscenity of the material involved as appellant does not argue that the magazines are not “harmful to minors.” P. 635.

3. It is not constitutionally impermissible for New York, under this statute, to accord minors under 17 years of age a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read and see. Pp. 637–643.

(a) The State has power to adjust the definition of obscenity as applied to minors, for even where there is an invasion of protected freedoms “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” *Prince v. Massachusetts*, 321 U.S. 158, 170. Pp. 638–639.

(b) Constitutional interpretation has consistently recognized that the parents’ claim to authority in the rearing of their children is basic in our society, and the legislature could properly conclude that those primarily responsible for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility. P. 639.

(c) The State has an independent interest in protecting the welfare of children and safeguarding them from abuses. Pp. 640-641.

(d) This Court cannot say that the statute, in defining obscenity on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm. Pp. 641-643.

4. Subsections (f) and (g) of § 484-h are not void for vagueness. Pp. 643-645.

(a) The New York Court of Appeals, in *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 76, 218 N. E. 2d 668, 671, construed the definition of obscenity "harmful to minors" in subsection (f) "as virtually identical to" this Court's most recent statement of the elements of obscenity in *Memoirs v. Massachusetts*, 383 U.S. 413, 418, and accordingly the definition gives adequate notice of what is prohibited and does not offend due process requirements. P. 643.

(b) Since the New York Legislature's attention was drawn to *People v. Finkelstein*, 9 N.Y. 2d 342, 174 N. E. 2d 470, which defined the nature of *scienter* for New York's general obscenity statute, when it considered § 484-h, it may be inferred that the reference in provision (i) of subsection (g) to knowledge of the "character and content" of the material incorporates the gloss given the term "character" in *People v. Finkelstein*. P. 644.

(c) Provision (ii) of subsection (g) states expressly that a defendant must be acquitted on the ground of "honest mistake" if he proves that he made "a reasonable bona fide attempt to ascertain the true age of such minor." P. 645.

Affirmed.

Emanuel Redfield argued the cause for appellant. With him on the brief was Benjamin E. Winston.

William Cahn argued the cause for appellee. With him on the brief was George Danzig Levine.

Briefs of amici curiae, urging reversal, were filed by Osmond K. Fraenkel, Edward J. Ennis, Melvin L. Wulf and Alan H. Levine for the American Civil Liberties Union et al., by Morris B. Abram and Jay Greenfield for the Council for Periodical Distributors Associations, Inc. by Horace S. Manges and Marshall C. Berger for the American Book Publishers Council, Inc., and by Irwin Karp for the Authors League of America, Inc.

Brief of amicus curiae, urging affirmance, was filed by Charles H. Keating, Jr., and James J. Clancy for the Citizens for Decent Literature, Inc.

Mr. Justice Brennan delivered the opinion of the Court:

This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.

Appellant and his wife operate "Sam's Stationery and Luncheonette" in Bellmore, Long Island. They have a lunch counter, and, among other things, also sell magazines including some so-called "girlie" magazines. Appellant was prosecuted under two informations, each in two counts, which charged that he personally sold a 16-year-old boy two "girlie" magazines on each of two dates in October 1965, in violation of § 484-h of the New York Penal Law. He was tried before a judge without a jury in Nassau County District Court and was found guilty on both counts.¹ The judge found (1) that the magazines contained pictures which depicted female "nudity" in a manner defined in subsection 1(b), that is "the showing of . . . female . . . buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . .," and (2) that the pictures were "harmful to minors" in that they had, within the meaning of subsection 1(f) "that quality of . . . representation . . . of nudity . . . [which] . . . (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." He held that both sales to the 16-year-old boy therefore constituted the violation under § 484-h of "knowingly to sell . . . to a minor" under 17 of "(a) any picture . . . which depicts nudity . . . and which is harmful to minors," and "(b) any . . . magazine . . . which contains . . . [such pictures] . . . and which, taken as a whole, is harmful to minors." The conviction was affirmed without opinion by the Appellate Term, Second Department, of the Supreme Court. Appellant was denied leave to appeal to the New York Court of Appeals and

¹ Appellant makes no attack upon § 484-h as applied. We therefore have no occasion to consider the sufficiency of the evidence, or such issues as burden of proof, whether expert evidence is either required or permissible, or any other questions which might be pertinent to the application of the statute. Appellant does argue that because the trial judge included a finding that two of the magazines "contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct," an offense not charged in the informations, the conviction must be set aside under *Cole v. Arkansas*, 333 U.S. 196. But this case was tried and the appellant was found guilty only on the charges of selling magazines containing pictures depicting female nudity. It is therefore not a case where defendant was tried and convicted of a violation of one offense when he was charged with a distinctly and substantially different offense.

The full text of § 484-h is attached as Appendix A. It was enacted in L. 1965, c. 327, to replace an earlier version held invalid by the New York Court of Appeals in *People v. Kohan*, 15 N.Y. 2d 311, 206 N.E. 2d 333, and *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 201 N.E. 2d 14. Section 484-h in turn was replaced by L. 1967, c. 791, now §§ 235.20-235.22 of the Penal Law. The major changes under the 1967 law added a provision that the one charged with a violation "is presumed to [sell] with knowledge of the character and content of the material sold . . .," and the provision that "It is an affirmative defense that: (a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and (b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more." Neither addition is involved in this case. We intimate no view whatever upon the constitutional validity of the presumption. See in general *Smith v. California*, 361 U.S. 147; *Speiser v. Randall*, 357 U.S. 513; 41 N.Y.U. L. Rev. 791 (1966); 30 Albany L. Rev. 133 (1966).

The 1967 law also repealed outright § 484-i which had been enacted one week after § 484-h. L. 1965, c. 327. It forbade sales to minors under the age of 18. The New York Court of Appeals sustained its validity against a challenge that it was void for vagueness. *People v. Tannenbaum*, 18 N.Y. 2d 268, 220 N.E. 2d 783. For an analysis of § 484-i and a comparison with § 484-h see 33 Brooklyn L. Rev. 329 (1967).

then appealed to this Court. We noted probable jurisdiction. 388 U.S. 904. We affirm.²

I

The "girlie" picture magazines involved in the sales here are not obscene for adults, *Redrup v. New York*, 386 U.S. 767.³ But § 484-h does not bar the appellant from stocking the magazines and selling them to persons 17 years of age or older, and therefore the conviction is not invalid under our decision in *Butler v. Michigan*, 352 U.S. 380.

Obscenity is not within the area of protected speech or press. *Roth v. United States*, 354 U.S. 476, 485. The three-pronged test of subsection 1(f) for judging the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under *Roth* stated in the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413, 418. Appellant's primary attack upon § 484-h is leveled at the power of the State to adapt this *Memoirs* formulation to define the material's obscenity on the basis of its appeal to minors, and thus exclude material so defined from the area of protected expression. He makes no argument that the magazines are not "harmful to minors" within the definition in subsection 1(f). Thus "[n]o issue is presented . . . concerning the obscenity of the material involved." *Roth*, *supra*, at 481, n. 8.

The New York Court of Appeals "upheld the Legislature's power

² The case is not moot. The appellant might have been sentenced to one year's imprisonment, or a \$500 fine or both, N.Y. Penal Law § 1937. The trial judge however exercised authority under N.Y. Penal Law § 2188 and on May 17, 1966, suspended sentence on all counts. Under § 470-a of the New York Code of Criminal Procedure, the judge could thereafter recall appellant and impose sentence only within one year, or before May 17, 1967. The judge did not do so. Although *St. Pierre v. United States*, 319 U.S. 41, held that a criminal case had become moot when the petitioner finished serving his sentence before direct review in this Court, *St. Pierre* also recognized that the case would not have been moot had "petitioner shown that under either State or Federal law further penalties or disabilities can be imposed on him as result of the judgment which has now been satisfied." *Id.*, at 43. The State of New York concedes in its brief in this court addressed to mootness "that certain disabilities do flow from the conviction." The brief states that among these is "the possibility of ineligibility for licensing under state and municipal license laws regulating various lawful occupations . . ." Since the argument, the parties advised the Court that, although this is the first time appellant has been convicted of any crime, this conviction might result in the revocation of the license required by municipal law as a prerequisite to engaging in the luncheonette business he carries on in Bellmore, New York. Bellmore is an "unincorporated village" within the town of Hempstead, Long Island, 1967 N.Y. S. Leg. Man. 1154. The town has a licensing ordinance which provides that the "Commissioner of Buildings . . . may suspend or revoke any license issued, in his discretion, for . . . (e) conviction of any crime." LL 21. Town of Hempstead, eff. December 1, 1966. § 8.1(e). In these circumstances the case is not moot since the conviction may entail collateral consequences sufficient to bring the case within the *St. Pierre* exception. See *Fiswick v. United States*, 329 U.S. 211, 220-222. We were not able to reach that conclusion in *Tannenbaum v. New York*, 388 U.S. 439, or *Jacobs v. New York*, 388 U.S. 431, in which the appeals were dismissed as moot. In *Tannenbaum* there was no contention that the convictions under the now repealed § 484-i entailed any collateral consequences. In *Jacobs* the appeal was dismissed on motion of the State which alleged, *inter alia*, that New York law did not impose "any further penalty upon conviction of the misdemeanor here in issue." Appellant did not there show, or contend, that his license might be revoked for "conviction of any crime"; he asserted only that the conviction might be the basis of a suspension under a provision of the Administrative Code of the City of New York requiring the Department of Licenses to assure that motion picture theatres are not conducted in a manner offensive to "public morals."

³ One of the magazines was an issue of the magazine "Sir." We held in *Gent v. Arkansas*, decided with *Redrup v. New York*, 386 U.S. 767, 769, that an Arkansas statute which did not reflect a specific and limited state concern for juveniles was unconstitutional insofar as it was applied to suppress distribution of another issue of that magazine. Other cases which turned on findings of nonobscenity of this type of magazine include: *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Conner v. City of Hammond*, 389 U.S. 48; *Potomac News Co. v. United States*, 389 U.S. 47; *Maces v. Ohio*, 388 U.S. 453; *A quantity of Books v. Kansas*, 388 U.S. 452; *Books, Inc. v. United States*, 388 U.S. 449; *Aday v. United States*, 388 U.S. 447; *Avansino v. New York*, 388 U.S. 446; *Shepherd v. New York*, 388 U.S. 444; *Friedman v. New York*, 388 U.S. 441; *Keney v. New York*, 388 U.S. 440; see also *Rosenbloom v. Virginia*, 388 U.S. 450; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372.

to employ variable concepts of obscenity”⁴ in a case in which the same challenge to state power to enact such a law was also addressed to § 484-h, *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 218 N.E. 2d 668, appeal dismissed for want of a properly presented federal question, *sub nom. Bookcase, Inc. v. Leary*, 385 U.S. 12. In sustaining state power to enact the law, the Court of Appeals said, *Bookcase, Inc. v. Broderick*, at 75, 218 N.E. 2d, at 671:

“[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State’s exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.”

Appellant’s attack is not that New York was without power to draw the line at age 17. Rather, his contention is the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor. He accordingly insists that the denial to minors under 17 of access to material condemned by § 484-h, insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty.

We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. *In re Gault*, 387 U.S. 1, 13. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as § 484-h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.⁵

⁴ *People v. Tannenbaum*, 18 N.Y. 2d 268, 270, 220 N. E. 2d 783, 785, dismissed as moot, 388 U.S. 439. The concept of variable obscenity is developed in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. I. Rev. 5 (1960). At 85 the authors state:

“Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the mark-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.”

⁵ Suggestions that legislatures might give attention to laws dealing specifically with safeguarding children against pornographic material have been made by many judges and commentators. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 195 (opinion of Justices Brennan and Goldberg); *id.*, at 201 (dissenting opinion of The Chief Justice); *Ginzburg v. United States*, 383 U.S. 463, 498, n. 1 (dissenting opinion of Mr. Justice Stewart); *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, 593; *In re Louisiana News Co.*, 187 F. Supp. 241, 247; *United States v. Levine*, 83 F. 2d 156; *United States v. Dennett*, 39 F. 2d 564; R. Kuh, *Foolish Figleaves?* 258-260 (1967); Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 939 (1963); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. Pa. L. Rev. 838, 848 (1964); Henklin, *Morals and the Constitution: The Sin of Obscenity*, 63 Col. L. Rev. 391, 413, n. 63 (1963); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, 7; Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Sup. Ct. Rev. 7, 75.

The obscenity laws of 35 other States include provisions referring to minors. The laws are listed in Appendix B to this opinion. None is a precise counterpart of New York’s § 484-h and we imply no view whatever on questions of their constitutionality.

Appellant argues that there is an invasion of protected rights under § 484-h constitutionally indistinguishable from the invasions under the Nebraska statute forbidding children to study German, which was struck down in *Myer v. Nebraska*, 262 U.S. 390; the Oregon statute interfering with children's attendance at private and parochial schools, which was struck down in *Pierce v. Society of Sisters*, 268 U.S. 510; and the statute compelling children against their religious scruples to give the flag salute, which was struck down in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624. We reject that argument. We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather § 484-h simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . ." of such minors. *Mishkin v. New York*, 383 U.S. 502, 509; *Bookcase, Inc. v. Broderick*, *supra*, at 75, 218 N.E. 2d, at 671. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults" *Prince v. Massachusetts*, 321 U.S. 158, 170.⁶ In *Prince* we sustained the conviction of the guardian of a nine-year-old girl, both members of the sect of Jehovah's Witnesses, for violating the Massachusetts Child Labor Law by permitting the girl to sell the sect's religious tracts on the streets of Boston.

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors, under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, *supra*, at 166. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, subsec-

⁶ Many commentators, including many committed to the proposition that "[n]o general restriction on expression in terms of 'obscenity' can . . . be reconciled with the first amendment," recognize that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," and accordingly acknowledge a supervening state interest in the regulation of literature sold to children. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 938, 939 (1963):

"Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults." See also Gerber, *supra*, at 848; Kalven, *supra*, at 7; Magrath, *supra*, at 75. *Prince v. Massachusetts* is urged to be constitutional authority for such regulation. See, e.g., Kuh, *supra*, at 258-260; Comment, *Exclusion of Children from Violent Movies*, 67 Col. L. Rev. 1149, 1159-1160 (1967); Note, *Constitutional Problems in Obscenity Legislation Protecting Children*, 54 Geo. L. J. 1379 (1966).

tion 1(f)(ii) of § 484-h expressly recognizes the parental role in assessing sex-related material harmful to minors according "to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.⁷

The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in *Brookcase, Inc. v. Broderick*, *supra*, at 75, 218 N. E. 2d, at 671. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of *People v. Kahan*, 15 N. Y. 2d 311, 206 N. E. 2d 333, which had struck down the first version of § 484-h on grounds of vagueness. In his concurring opinion, *id.*, at 312, 206 N. E. 2d, at 334, he said:

"While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults."

In *Prince v. Massachusetts*, *supra*, at 165, this Court, too, recognized that the State has an interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens." The only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by § 484-h constitutes such an "abuse."

Section 484-e of the law states a legislative finding that the material condemned by § 484-h is "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." It is very doubtful that this finding expresses an accepted scientific fact.⁸ But obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase "clear and present danger" in its application to protected speech. *Roth v. United States*, *supra*, at 486-487.⁹ To sustain

⁷ One commentator who argues that obscenity legislation might be constitutionally defective as an imposition of a single standard of public morality would give effect to the parental role and accept laws relating only to minors. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Col. L. Rev. 391, 413, n. 68 (1963):

"One must consider also how much difference it makes if laws are designed to protect only the morals of a child. While many of the constitutional arguments against morals legislation apply equally to legislation protecting the morals of children, one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit." See also Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 Wm. & Mary L. Rev. 302, 320-321 (1967).

⁸ Compare *Memoirs v. Massachusetts*, 383 U.S., at 424 (opinion of Douglas, J.) with *id.*, at 441 (opinion of Clark J.). See Kuh, *supra*, cc. 18-19; Gaylin, Book Review, 77 Yale L. J. 579, 591-595 (1968); Magrath, *supra*, at 52.

⁹ Our conclusion in *Roth*, at 486-487, that the clear and present danger test was irrelevant to the determination of obscenity made it unnecessary in that case to consider the debate among the authorities whether exposure to pornography caused antisocial consequences. See also *Mishkin v. New York*, *supra*; *Ginzburg v. United States*, *supra*; *Memoirs v. Massachusetts*, *supra*.

state power to exclude material defined as obscenity by § 484-h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors. In *Meyer v. Nebraska*, *supra*, at 400, we were able to say that children's knowledge of the German language "cannot reasonably be regarded as harmful." That cannot be said by us of minors' reading and seeing sex material. To be sure, there is no lack of "studies" which purport to demonstrate that obscenity is or is not "a basic factor in impairing the ethical and moral development of . . . youth and a clear and present danger to the people of the state." But the growing consensus of commentators is that "while these studies all agreed that a causal link has not been disproved either."¹⁰ We do not demand of legislatures "scientifically certain criteria of legislation." *Noble State Bank v. Haskell*, 219 U.S. 104, 110. We therefore cannot say that § 484-h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.

II

Appellant challenges subsections (f) and (g) of § 484-h as in any event void for vagueness. The attack on subsection (f) is that the definition of obscenity "harmful to minors" is so vague that an honest distributor of publications cannot know when he might be held to have violated § 484-h. But the New York Court of Appeals construed this definition to be "virtually identical to the Supreme Court's most recent statement of the elements of obscenity. [*Memoirs v. Massachusetts*, 383 U.S. 413, 418]," *Bookcase, Inc. v. Broderick*, *supra*, at 76, 218 N. E. 2d, at 672. The definition therefore gives "men in acting adequate notice of what is prohibited" and does not offend the requirements of due process. *Roth v. United States*, *supra*, at 492; see also *Winters v. New York*, 333 U.S. 507, 520.

¹⁰ Magrath, *supra*, at 52. See, e.g., *id.*, at 49-56; Dibble, *Obscenity: A State Quarantine to Protect Children*, 39 So. Cal. L. Rev. 345 (1966); Wall, *Obscenity and Youth: The Problem and a Possible Solution*, Crim. L. Bull., Vol. 1, No. 8, pp. 28, 30 (1965); Note, 55 Cal. L. Rev. 926, 934 (1967); Comment, 34 Ford. L. Rev. 692, 694 (1966). See also J. Paul & M. Schwartz, *Federal Censorship: Obscenity in the Mail*, 191-192; Blakey, *Book Review*, 41 Notre Dame Law, 1055, 1060, n. 46 (1966); Green, *Obscenity, Censorship, and Juvenile Delinquency*, 14 U. Toronto L. Rev. 229, 249 (1962); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 373-385 (1954); Note, 52 Ky. L. J. 429, 447 (1964). But despite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct, or will probably induce its recipients to such conduct, a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the views of some psychiatrists in 77 Yale L. J., at 592-593, said:

"It is in the period of growth [of youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control—it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging."

Dr. Gaylin emphasises that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read:

"[P]sychiatrists . . . make a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego." *Id.*, at 594.

As is required by *Smith v. California*, 361 U.S. 147, § 484-h prohibits only those sales made "knowingly." The challenge to the *scienter* requirement of subsection (g) centers on the definition of "knowingly" insofar as it includes "reason to know" or "a belief or ground for belief which warrants further inspection or inquiry of both: (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

As to (i), § 484-h was passed after the New York Court of Appeals decided *People v. Finkelstein*, 9 N.Y. 2d 342, 174 N.E. 2d 470, which read the requirement of *scienter* into New York's general obscenity statute, § 1141 of the Penal Law. The constitutional requirement of *scienter*, in the sense of knowledge of the contents of material, rests on the necessity "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity," *Mishkin v. New York*, *supra*, at 511. The Court of Appeals in *Finkelstein* interpreted § 1141 to require "the vital element of scienter" and defined that requirement in these terms: "A reading of the statute [§ 1141] as a whole clearly indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished. It is not innocent but *calculated* purveyance of filth which is excused. . . ." 9 N.Y. 2d, at 344-345, 174 N.E. 2d, at 471. (Emphasis supplied.) In *Mishkin v. New York*, *supra*, at 510-511, we held that a challenge to the validity of § 1141 founded on *Smith v. California*; *supra*, was foreclosed in light of this construction. When § 484-h was before the New York Legislature its attention was directed to *People v. Finkelstein*, as defining the nature of *scienter* required to sustain the statute. 1965 N.Y. S. Leg. Ann. 54-56. We may therefore infer that the reference in provision (i) to knowledge of "the character and content of any material described herein" incorporates the gloss given the term "character" in *People v. Finkelstein*. In that circumstance *Mishkin* requires rejection of appellant's challenge to provision (i) and makes it unnecessary for us to define further today "what sort of mental element is requisite to a constitutionally permissible prosecution," *Smith v. California*, *supra*, at 154.

Appellant also attacks provision (ii) as impermissibly vague. This attack however is leveled only at the proviso according the defendant a defense of "honest mistake" as to the age of the minor. Appellant argues that "the statute does not tell the bookseller what effort he must make before he can be excused." The argument is wholly without merit. The proviso states expressly that the defendant must be acquitted on the ground of "honest mistake" if the defendant proves that he made "a reasonable bona fide attempt to ascertain the true age of such minor." Cf. 1967 Penal Law § 235.22(2), n. 1, *supra*.

Affirmed.

[For concurring opinion of Mr. Justice Harlan see *post*, p. 704.]

APPENDIX A TO OPINION OF THE COURT

New York Penal Law § 484-h as enacted by L. 1965, c. 327, provides:
 § 484-h. Exposing minors to harmful materials

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both: (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a mone-

tary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

APPENDIX B TO OPINION OF THE COURT

State obscenity statutes having some provision referring to distribution to minors are:

Cal. Pen. Code §§ 311-312 (Supp. 1966); Colo. Rev. Stat. Ann. §§ 40-9-16 to 40-9-27 (1963); Conn. Gen. Stat. Rev. §§ 53-243 to 53-245 (Supp. 1965); Del. Code Ann., Tit. 11, §§ 435, 711-713 (1953); Fla. Stat. Ann. §§ 847.011-847.06 (1965 and Supp. 1968); Ga. Code Ann. §§ 26-6301 to 26-6309a (Supp. 1967); Hawaii Rev. Laws § 267-8 (1955); Idaho Code Ann. §§ 18-1506 to 18-1510 (Supp. 1967); Ill. Ann. Stat., c. 38, §§ 11-20 to 11-21 (Supp. 1967); Iowa Code Ann. §§ 725.4-725.12 (1950); Ky. Rev. Stat. §§ 436.100-436.130, 436.540-436.580 (1963 and Supp. 1966); La. Rev. Stat. §§ 14:91.11, 14:92, 14:106 (Supp. 1967); Me. Rev. Stat. Ann., Tit. 17, §§ 2901-2905 (1964); Md. Ann. Code, Art. 27, §§ 417-425 (1957 and Supp. 1967); Mass. Gen. Laws Ann., c. 272, §§ 28-33 (1959 and Supp. 1968); Mich. Stat. Ann. §§ 28.575-28.579 (1954 and Supp. 1968); Mo. Ann. Stat. §§ 563.270-563.310 (1953 and Supp. 1967); Mont. Rev. Codes Ann. §§ 94-3601 to 94-3606 (1947 and Supp. 1967); Neb. Rev. Stat. §§ 28-926.09 to 28-926.10 (1965 Cum. Supp.); Nev. Rev. Stat. §§ 201.250, 207.180 (1965); N. H. Rev. Stat. Ann. §§ 571-A:1 to 571-A:5 (Supp. 1967); N. J. Stat. Ann. §§ 2A:115-1.1 to 2A:115-4 (Supp. 1967); N. C. Gen. Stat. § 14-189 (Sup. 1967); N. D. Cent. Code §§ 12-21-07 to 12-21-09 (1960); Ohio Rev. Code Ann. §§ 2903.10-2903.11, 2905.34-2905.39 (1954 and Supp. 1966); Okla. Stat. Ann., Tit. 21, §§ 1021-1024, 1032-1039 (1958 and Supp. 1967); Pa. Stat. Ann., Tit. 18, §§ 3831-3833, 4524 (1963 and Supp. 1967); R. I. Gen. Laws Ann. §§ 11-31-1 to 11-31-10 (1956 and Supp. 1967); S. C. Code Ann. §§ 16-414.1 to 16-421 (1962 and Supp. 1967); Tex. Pen. Code, Arts. 526, 527b (1952 and Supp. 1967); Utah Code Ann. §§ 76-39-5, 76-39-17 (Supp. 1967); Vt. Stat. Ann., Tit. 13, §§ 2801-2805 (1959); Va. Code Ann. §§ 18.1-227 to 18.1-236.3 (1960 and Supp. 1966); W. Va. Code Ann. § 61-8-11 (1966); Wyo. Stat. Ann. §§ 6-103, 7-148 (1957).

Mr. JUSTICE STEWART, concurring in the result:

A doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of this New York statute.¹ But that result is not required, I think, if we bear in mind what it is that the First Amendment protects.

The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a "free trade in ideas."² To that end, the Constitution protects more than just

¹ The First Amendment is made applicable to the States through the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359.

² *Abrams v. United States*, 250 U.S. 616, 630 (dissenting opinion).

a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.

When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinion on others "by way of sound trucks with loud and raucous noises on city streets."³ And so it was that my Brothers BLACK and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience.⁴

I think a State may permissibly determine that, at least in some precisely delineated areas, a child⁵—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.⁶

I cannot hold that this state law, on its face,⁷ violates the First and Fourteenth Amendments.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting:

While I would be willing to reverse the judgment on the basis of *Redrup v. New York*, 386 U.S. 767, for the reasons stated by my Brother FORTAS, my objections strike deeper.

If we were in the field of substantive due process and seeking to measure the propriety of state law by the standards of the Fourteenth Amendment, I suppose there would be no difficulty under our decisions in sustaining this act. For there is a view held by many that the so-called "obscene" book or tract or magazine has a deleterious effect upon the young, although I seriously doubt the wisdom of trying by law to put the fresh, evanescent, natural blossoming of sex in the category of "sin."

That, however, was the view of our preceptor in this field, Anthony Comstock, who waged his war against "obscenity" from the year 1872 until his death in 1915. Some of his views are set forth in his book *Traps for the Young*, first published in 1883, excerpts from which I set out in Appendix I to this opinion.

The title of the book refers to "traps" created by Satan "for boys and girls especially." Comstock, of course, operated on the theory that

³ *Kovacs v. Cooper*, 336 U. S. 77, 86.

⁴ *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 466 (dissenting opinion of Mr. Justice Black), 467 (dissenting opinion of Mr. Justice Douglas).

⁵ The appellant does not challenge New York's power to draw the line at age 17, and I intimate no view upon that question.

⁶ Compare *Loving v. Virginia*, 388 U. S. 1, 12; *Carrington v. Rash*, 380 U. S. 89, 96.

⁷ As the Court notes, the appellant makes no argument that the material in this case was not "harmful to minors" within the statutory definition, or that the statute was unconstitutionally applied.

every human has an "inborn tendency toward wrongdoing which is restrained mainly by fear of the final judgment." In his view any book which tended to remove that fear is a part of the "trap" which Satan created. Hence, Comstock would have condemned a much wider range of literature than the present Court is apparently inclined to do.¹

It was Comstock who was responsible for the Federal Anti-Obscenity Act of March 3, 1873, 17 Stat. 598. It was he who was also responsible for the New York Act which soon followed. He was responsible for the organization of the New York Society for the Suppression of Vice, which by its act of incorporation was granted one-half of the fines levied on people successfully prosecuted by the Society or its agents.

I would conclude from Comstock and his Traps for the Young and from other authorities that a legislature could not be said to be wholly irrational² (*Ferguson v. Skrupa*, 372 U.S. 726; and see *Williamson v. Lee Optical Co.*, 348 U.S. 483; *Daniel v. Family Ins. Co.*, 336 U.S. 220; *Olsen v. Nebraska*, 313 U.S. 236) if it decided that sale of "obscene" material to the young should be banned.³

The problem under the First Amendment, however, has always seemed to me to be quite different. For its mandate (originally applicable only to the Federal Government but now applicable to the States as well by reason of the Fourteenth Amendment) is directed to any law "abridging the freedom of speech, or of the press." I appreciate that there are those who think that "obscenity" is impliedly excluded; but I have indicated on prior occasions why I have been unable to

¹ Two writers have explained Comstock as follows:

"He must have known that he could not wall out from his own mind all erotic fancies, and so he turned all the more fiercely upon the ribaldry of others." H. Bronn & M. Leech, *Anthony Comstock* 27 (1927).

A notable forerunner of Comstock was an Englishman, Thomas Bowdler. Armed with a talent for discovering the "offensive," Bowdler expurgated Shakespeare's plays and Gibbon's History of the Decline and Fall of the Roman Empire. The result was "The Family Shakespeare," first published in 10 volumes in 1818, and a version of Gibbon's famous history "omitting everything of an immoral or irreligious nature, and incidentally rearranging the order of chapters to be in the strict chronology so dear to the obsessional heart." M. Wilson, *The Obsessional Compromise, A Note on Thomas Bowdler* (1965) (paper in Library of the American Psychiatric Association, Washington, D. C.).

² "The effectiveness of more subtle forms of censorship as an instrument of social control can be very great. They are effective over a wider field of behavior than is propaganda in that they affect convivial and purely personal behavior.

"The principle is that certain verbal formulae shall not be stated, in print or in conversation; from this the restriction extends to the discussion of certain topics. A perhaps quite rationally formulated taboo is imposed; it becomes a quasi-religious factor for the members of the group who subscribe to it. If they are a majority, and the taboo does not affect some master-symbol of an influential minority, it is apt to become quite universal in its effect. A great number of taboos—to expressive and to other acts—are embodied in the *mores* of any people. The sanction behind each taboo largely determines its durability—in the sense of resistance opposed to the development of contradictory *counter-mores*, or of simple disintegration from failure to give returns in personal security. If it is to succeed for a long time, there must be recurrent reaffirmations of the taboo in connection with the sanctioning power.

"The occasional circulation of stories about a breach of the taboo and the evil consequences that flowed from this to the offender and to the public cause (the sanctioning power) well serves this purpose. Censorship of this sort has the color of voluntary acceptance of a ritualistic avoidance, in behalf of oneself and the higher power. A violation, after the primitive patterns to which we have all been exposed, strikes at both the sinner and his god." The William Alanson White Psychiatric Foundations Memorandum: Propaganda & Censorship, 3 *Psychiatry* 628, 631 (1940).

³ And see Gaylin, Book Review: *The Prickly Problems of Pornography*, 77 *Yale L. J.* 579, 594.

reach that conclusion.⁴ See *Ginzberg v. United States*, 383 U.S. 463, 482 (dissenting opinion); *Jacobellis v. Ohio*, 378 U.S. 184, 196 (concurring opinion of Mr. Justice Black); *Roth v. United States*, 354 U.S. 476, 508 (dissenting opinion). And the corollary of that view, as I expressed it in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 467, 468 (dissenting opinion), is that Big Brother can no more say what a person shall listen to or read than he can say what shall be published.

This is not to say that the Court and Anthony Comstock are wrong in concluding that the kind of literature New York condemns does harm. As a matter of fact, the notion of censorship is founded on the belief that speech and press sometimes do harm and therefore can be regulated. I once visited a foreign nation where the regime of censorship was so strict that all I could find in the bookstalls were tracts on religion and tracts on mathematics. Today the Court determines the constitutionality of New York's law regulating the sale of literature to children on the basis of the reasonableness of the law in light of the welfare of the child. If the problem of state and federal regulation of "obscenity" is in the field of substantive due process, I see no reason to limit the legislatures to protecting children alone. The "juvenile delinquents" I have known are mostly over 50 years of age. If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstocks could make out a case for "protecting" many groups in our society, not merely children.

While I find the literature and movies which come up for clearance exceedingly dull and boring, I understand how some can and do become very excited and alarmed and think that something should be done to stop the flow. It is one thing for parents⁵ and the religious

⁴ My Brother Harlan says that no other Justice of this Court, past or present, has ever "stated his acceptance" of the view that "obscenity" is within the protection of the First and Fourteenth Amendments. *Post*, at 705. That observation, however, should not be understood as demonstrating that no other members of this Court, since its first Term in 1790, have adhered to the view of my Brother Black and myself. For the issue "whether obscenity is utterance within the area of protected speech and press" was only "squarely presented" to this Court for the first time in 1957, *Roth v. United States*, 354 U.S. 476, 481. This is indeed understandable, for the state legislatures have borne the main burden in enacting laws dealing with "obscenity"; and the strictures of the First Amendment were not applied to them through the Fourteenth until comparatively late in our history. In *Gitlow v. New York*, 268 U.S. 652, decided in 1925, the Court assumed that the right of free speech was among the freedoms protected against state infringement by the Due Process Clause of the Fourteenth Amendment. See also *Whitney v. California*, 274 U.S. 357, 371, 373; *Piske v. Kansas*, 274 U.S. 380. In 1931, *Stromberg v. California*, 283 U.S. 359, held that the right of free speech was guaranteed in full measure by the Fourteenth Amendment. But even after these events "obscenity" cases were not inundating this Court; and even as late as 1948, the Court could say that many state obscenity statutes had "lain dormant for decades." *Winters v. New York*, 333 U.S. 507, 511. In several cases prior to *Roth*, the Court reviewed convictions under federal statutes forbidding the sending of "obscene" materials through the mails. But in none of these cases was the question squarely presented or decided whether "obscenity" was protected speech under the First Amendment; rather, the issues were limited to matters of statutory construction, or questions of procedure, such as the sufficiency of the indictment. See *United States v. Chase*, 135 U.S. 255; *Grimm v. United States*, 156 U.S. 604; *Rosen v. United States*, 161 U.S. 29; *Swearingen v. United States*, 161 U.S. 446; *Andreus v. United States*, 162 U.S. 420; *Price v. United States*, 165 U.S. 311; *Dunlop v. United States*, 165 U.S. 486; *Bartell v. United States*, 227 U.S. 427; *Dysart v. United States*, 272 U.S. 655; *United States v. Limehouse*, 285 U.S. 424. Thus, *Roth v. United States*, *supra*, which involved both a challenge to 18 U.S.C. § 1461 (punishing the mailing of "obscene" material) and, in a consolidated case (*Alberts v. California*), an attack upon Cal. Pen. Code § 311 (prohibiting, *inter alia*, the keeping for sale or advertising of "obscene" material) was the first case authoritatively to measure federal and state obscenity statutes against the prohibitions of the First and Fourteenth Amendments. I cannot speak for those who preceded us in time; but neither can I interpret occasional utterances suggesting that "obscenity" was not protected by the First Amendment as considered expressions of the views of any particular Justice of the Court. See, e.g., *Chapinsky v. New Hampshire*, 315 U.S. 568, 571-572; *Beauharnais v. Illinois*, 343 U.S. 250, 266. The most that can be said, then, is that no other members of this Court since 1957 have adhered to the view of my Brother Black and myself.

⁵ See Appendix II to this opinion.

organizations to be active and involved. It is quite a different matter for the state to become implicated as a censor. As I read the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distributions systems for all printed literature. Anthony Comstock wanted it the other way; he indeed put the police and prosecutor in the middle of this publishing business.

I think it would require a constitutional amendment to achieve that result. If there were a constitutional amendment, perhaps the people of the country would come up with some national board of censorship. Censors are, of course, propelled by their own neuroses.⁶ That is why a universally accepted definition of obscenity is impossible. Any definition is indeed highly subjective, turning on the neurosis of the censor. Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it.⁷ That, of course, is the danger of letting any group of citizens be the judges of what other people, young or old, should read. Those would be issues to be canvassed and debated in case of a constitutional amendment creating a regime of censorship in the country. And if the people, in their wisdom, launched us on that course, it would be a considered choice.

Today this Court sits as the Nation's board of censors. With all respect, I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old.

I would await a constitutional amendment that authorized the modern Anthony Comstocks to censor literature before publishers, authors, or distributors can be fined or jailed for what they print or sell.

APPENDIX I TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING

A. Comstock, Traps for the Young 20-22 (1883)

And it came to pass that as Satan went to and fro upon the earth, watching his traps and rejoicing over his numerous victims, he found room for improvement in some of his schemes. The daily press did not meet all his requirements. The weekly illustrated papers of crime would do for young men and sports, for brothels, gin mills, and thieves' resorts, but were found to be so gross, so libidinous, so monstrous, that every decent person spurned them. They were excluded

⁶ Reverend Fr. Juan de Castaniza of the 16th century explained those who denounced obscenity as expressing only their own feelings. In his view they had too much reason to suspect themselves of being "obscene," since "vicious men are always prone to think others like themselves." T. Schroeder, *A Challenge to Sex Censors* 44-45 (1938).

"Obscenity, like witchcraft . . . consists, broadly speaking, of a [delusional] projection of certain emotions (which, as the very word implies, emanate from within) to external things and an endowment of such things (or in the case of witchcraft, of such persons) with the moral qualities corresponding to these inward states . . ."

"Thus persons responsible for the persistent attempts to suppress the dissemination of popular knowledge concerning sex matters betray themselves unwittingly as the bearers of the very impulses they would so ostentatiously help others to avoid. Such persons should know through their own experience that ignorance of a subject does not insure immunity against the evils of which it treats, nor does the propitiatory act of noisy public disapproval of certain evils signify innocence or personal purity." Van Teslaar, *Book Review*, 8 J. Abnormal Psychology 282, 286 (1913).

⁷ See Appendix III to this opinion.

from the home on sight. They were too high-priced for children, and too cumbersome to be conveniently hid from the parent's eye or carried in the boy's pocket. So he resolved to make another trap for boys and girls especially.

He also resolved to make the most of these vile illustrated weekly papers, by lining the news-stands and shop-windows along the pathway of the children from home to school and church, so that they could not go to and from these places of instruction without giving him opportunity to defile their pure minds by flaunting these atrocities before their eyes.

And Satan rejoiced greatly that professing Christians were silent and apparently acquiesced in his plans. He found that our most refined men and women went freely to trade with persons who displayed these traps for sale; that few, if any, had moral courage to enter a protest against this public display of indecencies, and scarcely one in all the land had the boldness to say to the dealer in filth, "I will not give you one cent of my patronage so long as you sell these devil-traps to ruin the young." And he was proud of professing Christians and respectable citizens on this account, and caused honorable mention to be made of them in general order to his imps, because of the quiet and orderly assistance thus rendered him.

Satan stirred up certain of his willing tools on earth by the promise of a few paltry dollars to improve greatly on the death-dealing quality of the weekly death-traps, and forthwith came a series of new snares of fascinating construction, small and tempting in price, and baited with high-sounding names. These sure-ruin traps comprise a large variety of half-dime novels, five and ten cent story papers, and low-priced pamphlets for boys and girls.

This class includes the silly, inspired tale, the coarse, slangy story in a dialect of the barroom, the blood-and-thunder romance of border life, and the exaggerated details of crimes, real and imaginary. Some have highly colored sensational reports of real crimes, while others, and by far the larger number, deal with most improbable creations of fiction. The unreal far outstrips the real. Crimes are gilded, and lawlessness is painted to resemble valor, making a bid for bandits, brigands, murderers, thieves, and criminals in general. Who would go to the State prison, the gambling saloon, or the brothel to find a suitable companion for the child? Yet a more insidious foe is selected when these stories are allowed to become associates for the child's mind and to shape and direct the thoughts.

The finest fruits of civilization are consumed by these vermin. Nay, these products of corrupt minds are the eggs from which all kinds of villains are hatched. Put the entire batch of these stories together, and I challenge the publishers and vendors to show a single instance where any boy or girl has been elevated in morals, or where any noble or refined instinct has been developed by them.

The leading character in many, if not in the vast majority of these stories, is some boy or girl who possesses usually extraordinary beauty of countenance, the most superb clothing, abundant wealth, the strength of a giant, the agility of a squirrel, the cunning of a fox, the brazen effrontery of the most daring villain, and who is utterly destitute of any regard for the laws of God or man. Such a one is fore-

most among desperadoes, the companion and beau-ideal of maidens, and the high favorite of such rich person, who by his patronage and indorsement lifts the young villain into lofty positions in society, and provides liberally of his wealth to secure him immunity for his crimes. These stories link the pure maiden with the most foul and loathsome criminals. Many of them favor violation of marriage laws and cheapen female virtue.

APPENDIX II TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING

A Special to the Washington Post [March 3, 1968]
by Austin C. Wehrwein

White Bear Lake, Minn., March 2.—Faced with the threat of a law suit, the school board in this community of 12,000 north of St. Paul is reviewing its mandatory sex education courses, but officials expressed fear that they couldn't please everybody.

Mothers threatened to picket and keep their children home when sex education films are scheduled. Mrs. Robert Murphy, the mother of five who led the protests, charged that the elementary school "took the privacy out of marriage."

"Now," she said, "our kids know what a shut bedroom door means. The program is taking their childhood away. The third graders went in to see a movie on birth and came out adults."

She said second-grade girls have taken to walking around with "apples and oranges under their blouses." Her seventh-grade son was given a study sheet on menstruation, she said, demanding "why should a seventh-grade boy have to know about menstruation?"

Mrs. Murphy, who fears the program will lead to experimentation, said that it was "pagan" and argued that even animals don't teach their young those things "before they're ready."

"One boy in our block told his mother, 'Guess what, next week our teacher's gonna tell us how daddy fertilized you,'" reported Mrs. Martin Capeder. "They don't need to know all that."

But Norman Jensen, principal of Lincoln School, said that the program, which runs from kindergarten through the 12th grade, was approved by the school district's PTA council, the White Bear Lake Ministerial Association and the district school board. It was based, he said, on polls that showed 80 per cent of the children got no home sex education, and the curriculum was designed to be "matter-of-fact."

The protesting parents insisted they had no objection to sex education as such, but some said girls should not get it until age 12, and boys only at age 15—"or when they start shaving."

(In nearby St. Paul Park, 71 parents have formed a group called "Concerned Parents Against Sex Education" and are planning legal action to prevent sex education from kindergarten through seventh grade. They have also asked equal time with the PTAs of eight schools in the district "to discuss topics such as masturbation, contraceptives, unqualified instructors, religious belief, morality and attitudes.")

The White Bear protesters have presented the school board with a list of terms and definitions deemed objectionable. Designed for the seventh grade, it included vagina, clitoris, erection, intercourse and copulation. A film, called "Fertilization and Birth" depicts a woman

giving birth. It has been made optional after being shown to all classes.

Mrs. Ginny McKay, a president of one of the local PTAs defended the program, saying "Sex is a natural and beautiful thing. We (the PTA) realized that the parents had to get around to where the kids have been for a long time."

But Mrs. Murphy predicted this result: "Instead of 15 [*sic*] and 15-year-old pregnant girls, they'll have 12 and 13-year-old pregnant girls."

APPENDIX III TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING

(A). T. Schroeder, *Obscene Literature and Constitutional Law* 277-278 (1911)

It thus appears that the only unifying element generalized in the word "obscene," (that is, the only thing common to every conception of obscenity and indecency), is subjective, is an affiliated emotion of disapproval. This emotion under varying circumstances of temperament and education in different persons, and in the same person in different stages of development, is aroused by entirely different stimuli, and by fear of the judgment of others, and so has become associated with an infinite variety of ever-changing objectives, with not even one common characteristic in objective nature; that is, in literature or art.

Since few men have identical experiences, and fewer still evolve to an agreement in their conceptional and emotional associations, it must follow that practically none have the same standards for judging the "obscene," even when their conclusions agree. The word "obscene," like such words as delicate, ugly, lovable, hateful, etc., is an abstraction not based upon a reasoned, nor sense-perceived, likeness between objectives, but the selection or classification under it is made, on the basis of similarity in the emotions aroused, by an infinite variety of images; and every classification thus made, in turn, depends in each person upon his fears, his hopes, his prior experience, suggestions, education, and the degree of neuro-sexual or psycho-sexual health. Because it is a matter wholly of emotions, it has come to be that "men think they know because they feel, and are firmly convinced because strongly agitated."

This, then, is a demonstration that obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or picture. Since, then, the general conception "obscene" is devoid of every objective element of unification; and since the subjective element, the associated emotion, is indefinable from its very nature, and inconstant as to the character of the stimulus capable of arousing it, and variable and immeasurable as to its relative degrees of intensity, it follows that the "obscene" is incapable of accurate definition or a general test adequate to secure uniformity of result, in its application by every person, to each book of doubtful "purity."

Being so essentially and inextricably involved with human emotions that no man can frame such a definition of the word "obscene," either in terms of the qualities of a book, or such that, *by it alone*, any judgment whatever is possible, much less is it possible that by any such alleged "test" every other man must reach the same conclu-

sion about the obscenity of every conceivable book. Therefore, the so-called judicial "tests" of obscenity are not standards of judgment, but, on the contrary, by every such "test" the rule of decision is itself uncertain, and in terms invokes the varying experiences of the test[er]s within the foggy realm of problematical speculation about psychic tendencies, without the help of which the "test" itself is meaningless and useless. It follows that to each person the "test," of criminality, which should be a general standard of judgment, unavoidably becomes a personal and particular standard, differing in all persons according to those varying experiences which they read into the judicial "test." It is this which makes uncertain, and, therefore, all the more objectionable, all the present laws against obscenity. Later it will be shown that this uncertainty in the criteria of guilt renders these laws unconstitutional.

(B). Kallen, *The Ethical Aspects of Censorship*, in *5 Social Meaning of Legal Concepts* 34, 50-51 (N.Y. U. 1953)

To this authoritarian's will, difference is the same thing as inferiority, wickedness and corruption; he can apprehend it only as a devotion to error and a commitment to sin. He can acknowledge it only if he attributes to it moral turpitude and intellectual vice. Above all, difference must be for him, by its simple existence, an aggression against the good, the true, the beautiful and the right. His imperative is to destroy it; if he cannot destroy it, to contain it; if he cannot contain it, to hunt it down, cut it off and shut it out.

Certain schools of psychology suggest that this aggression is neither simple nor wholly aggression. They suggest that it expresses a compulsive need to bring to open contemplation the secret parts of the censor's psychosomatic personality, and a not less potent need to keep the secret and not suffer the shamefaced dishonor of their naked exposures. The censor's activities, in that they call for a constant public preoccupation with such secret parts, free his psyche from the penalties of such concern while transvaluing at the same time his pursuit and inspection of the obscene, the indecent, the poronographic, the blasphemous and the otherwise shameful into an honorable defense of the public morals. The censor, by purporting, quite unconscious of his actual dynamic, to protect the young from corruption, frees his consciousness to dwell upon corruption without shame or dishonor. Thus, Anthony Comstock could say with overt sincerity: "When the genius of the arts produces obscene, lewd and lascivious ideas, the deadly effect upon the young is just as perceptible as when the same ideas are represented by gross experience in prose and poetry. . . . If through the eye and ear the sensuous book, picture or story is allowed to enter, the thoughts will be corrupted, the conscience seared, so such things reproduced by fancy in the thoughts awaken forces for evil which will explode with irresistible force carrying to destruction every human safeguard to virtue and honor." Did not evil Bernard Shaw, who gave the English language the word comstockery, declare himself, in his preface to "The Shewing-Up of Blanco Posnet," "a specialist in immoral, heretical plays . . . to force the public to reconsider its morals"? So the brave Comstock passionately explored

and fought the outer expressions of the inner forces of evil and thus saved virtue and honor from destruction.

But could this observation of his be made, save on the basis of introspection and not the scientific study of others? For such a study would reveal, for each single instance of which it was true, hundreds of thousands of others of which it was false. Like the correlation of misfortune with the sixth day of the week or the number 13, this basic comstockery signalizes a fear-projected superstition. It is an externalization of anxiety and fear, not a fact objectively studied and appraised. And the anxiety and fear are reactions-formations of the censor's inner self.

Of course, this is an incomplete description of the motivation and logic of censorship. In the great censorial establishments of the tradition, these more or less unconscious drives are usually items of a syndrome whose dominants are either greed for pelf, power, and prestige, reinforced by anxiety that they might be lost, or anxiety that they might be lost reinforced by insatiable demands for more.

Authoritarian societies usually insure these goods by means of a prescriptive creed and code for which their rulers claim supernatural origins and supernatural sanctions. The enforcement of the prescriptions is not entrusted to a censor alone. The ultimate police-power is held by the central hierarchy, and the censorship of the arts is only one department of the thought-policing.

(C). Crawford, *Literature and the Psychopathic*, 10 *Psychoanalytic Review* 440, 445-446 (1923)

Objection, then, to modern works on the ground that they are, in the words of the objectors, "immoral," is made principally on the basis of an actual desire to keep sexual psychopathies intact, or to keep the general scheme of repression, which inevitably involves psychopathic conditions, intact. The activities of persons professionally or otherwise definitely concerned with censorship furnish proof evident enough to the student of such matters that they themselves are highly abnormal. It is safe to say that every censorship has a psychopath back of it.

Carried to a logical end, censorship would inevitably destroy all literary art. Every sexual act is an instinctive feeling out for an understanding of life. Literary art, like every other type of creative effort, is a form of sublimation. It is a more conscious seeking for the same understanding that the common man instinctively seeks. The literary artists, having attained understanding, communicates that understanding to his readers. That understanding, whether of sexual or other matters, is certain to come into conflict with popular beliefs, fears, and taboos because these are, for the most part, based on error. . . . [T]he presence of an opinion concerning which one thinks it would be unprofitable, immoral, or unwise to inquire is, of itself, strong evidence that that opinion is nonrational. Most of the more deep-seated convictions of the human race belong to this category. Anyone who is seeking for understanding is certain to encounter this nonrational attitude.

The act of sublimation on the part of the writer necessarily involves an act of sublimation on the part of the reader. The typical psychopathic patient and the typical public have alike a deep-rooted unconscious aversion to sublimation. Inferiority and other complexes enter in to make the individual feel that acts of sublimation would destroy his comfortable, though illusory, sense of superiority. Again, there is the realization on the part of the mass of people that they are unable to sublimate as the artist does, and to admit his power and right to do so involves destruction of the specious sense of superiority to him. It is these two forms of aversion to sublimation which account for a considerable part of public objection to the arts. The common man and his leader, the psychopathic reformer, are aiming unconsciously at leveling humanity to a place of pathological mediocrity.

To the student of abnormal psychology the legend, popular literature, and literature revelatory of actual life, are all significant. In the legend he finds race taboos, in the popular literature of the day he discovers this reinforced by the mass of contemporary and local taboos, in literature that aims to be realistically revelatory of life he finds material for study such as he can hardly obtain from any group of patients. The frankness which he seeks in vain from the persons with whom he comes into personal contact, he can find in literature. It is a field in which advances may be made comparable to the advances of actual scientific research.

Moreover, the student of abnormal psychology will commend realistic, revelatory literature not only to his patients, who are suffering from specific psychopathic difficulties, but to the public generally. He will realize that it is one of the most important factors in the development of human freedom. No one is less free than primitive man. The farther we can get from the attitude of the legend and its slightly more civilized successor, popular literature, the nearer we shall be to a significant way of life.

(D). J. Rinaldo, *Psychoanalysis of the "Reformer"* 56-60 (1921)

The other aspect of the humanist movement is a very sour and disgruntled puritanism, which seems at first glance to protest and contradict every step in the libidinous development. As a matter of fact it is just as much an hysterical outburst as the most sensuous flesh masses of Rubens, or the sinuous squirming lines of Louis XV decoration. Both are reactions to the same morbid past experience.

The Puritan like the sensualist rebels at the very beginning against the restraint of celibacy. Unfortunately, however, he finds himself unable to satisfy the libido in either normal gratification or healthy converted activities. His condition is as much one of super-excitement as that of the libertine. Unable to find satisfaction in other ways, from which for one reason or another he is inhibited, he develops a morbid irritation, contradicting, breaking, prohibiting and thwarting the manifestations of the very exciting causes.

Not being able to produce beautiful things he mars them, smashing stained glass windows, destroying sculptures, cutting down Maypoles, forbidding dances, clipping the hair, covering the body with hideous misshapen garmets and silencing laughter and song. He can-

not build so he must destroy. He cannot create so he hinders creation. He is a sort of social abortionist and like an abortionist only comes into his own when there is an illegitimate brat to be torn from the womb. He cries against sin, but it is the pleasure of sin rather than the sin he fights. It is the enjoyment he is denied that he hates.

From no age or clime or condition is he absent; but never is he a dominant and deciding factor in society till that society has passed the bounds of sanity. Those who wait the midwife never call in the abortionist, nor does he ever cure the real sickness of his age. That he does survive abnormal periods to put his impress on the repressions of later days is due to the peculiar economy of his behavior. The libertine destroys himself, devouring his substance in self-satisfaction. The reformer devours others, being somewhat in the nature of a tax on vice, living by the very hysteria that destroys his homologous opposite.

In our own day we have reached another of those critical periods strikingly similar in its psychological symptoms and reactions, at least, to decadent Rome. We have the same development of extravagant religious cults, Spiritism, Dowieism, "The Purple Mother," all eagerly seized upon, filling the world with clamor and frenzy; the same mad seeking for pleasure, the same breaking and scattering of forms, the same orgy of gluttony and extravagance, the same crude emotionalism in art, letters and the theater, the same deformed and inverted sexual life.

Homo-sexualism may not be openly admitted, but the "sissy" and his red necktie are a familiar and easily understood property of popular jest and pantomime. It is all a mad jazz jumble of hysterical incongruities, dog dinners, monkey marriages, cubism, birth control, feminism, free-love, verse libre, and moving pictures. Through it all runs the strident note of puritanism. As one grows so does the other. Neither seems to precede or follow.

It would be a rash man indeed who would attempt to give later beginnings to the reform movements than to the license they seem so strongly to contradict. Significant indeed is the fact that their very license is the strongest appeal of the reformer. Every movie must preach a sermon and have a proper ending, but the attempted rape is as seldom missing as the telephone; and it is this that thrills and is expected to thrill.

The same sexual paradox we saw in the eunuch priests and harlot priestesses of Isis we see in the vice-crusading, vice-pandering reformers. Back of it all lies a morbid sexual condition, which is as much behind the anti-alcoholism of the prohibitionist, as behind the cropped head of this puritan father, and as much behind the birth-control, vice-crusading virgins as behind their more amiable sisters of Aphrodite.

Interpreted then in the light of their history, libertinism and reformism cannot be differentiated as cause and effect, action and reaction, but must be associated as a two-fold manifestation of the same thing, an hysterical condition. They differ in externals, only insofar as one operates in license and the other in repression, but both have the same genesis and their development is simultaneous.

(E). H. Lasswell, *Psychopathology and Politics* 94-96 (1930)

Another significant private motive, whose organization dates from early family days, but whose influence was prominent in adult behavior, was A's struggle to maintain his sexual repressions. ["A" is an unidentified, nonfictional person whose life history was studied by the author.] He erected his very elaborate personal prohibitions into generalized prohibitions for all society, and just as he laid down the law against brother-hatred, he condemned "irregular" sexuality and gambling and drinking, its associated indulgences. He was driven to protect himself from himself by so modifying the environment that his sexual impulses were least often aroused, but it is significant that he granted partial indulgence to his repressed sexuality by engaging in various activities closely associated with sexual operations. Thus his sermons against vice enabled him to let his mind dwell upon rich fantasies of seduction. His crusading ventures brought him to houses of ill fame, where partly clad women were discoverable in the back rooms. These activities were rationalized by arguing that it was up to him as a leader of the moral forces of the community to remove temptation from the path of youth. At no time did he make an objective inquiry into the many factors in society which increase or diminish prostitution. His motives were of such an order that he was prevented from self-discipline by prolonged inspection of social experience.

That A was never able to abolish his sexuality is sufficiently evident in his night dreams and day dreams. In spite of his efforts to "fight" these manifestations of his "antisocial impulses," they continued to appear. Among the direct and important consequences which they produced was a sense of sin, not only a sense of sexual sin, but a growing conviction of hypocrisy. His "battle" against "evil" impulses was only partially successful, and this produced a profound feeling of insecurity.

This self-punishing strain of insecurity might be alleviated, he found, by publicly reaffirming the creed of repression, and by distracting attention to other matters. A's rapid movements, dogmatic assertions, and diversified activities were means of escape from this gnawing sense of incapacity to cope with his own desires and to master himself. Uncertain of his power to control himself, he was very busy about controlling others, and engaged in endless committee sessions, personal conferences, and public meetings for the purpose. He always managed to submerge himself in a buzzing life of ceaseless activity; he could never stand privacy and solitude, since it drove him to a sense of futility; and he couldn't undertake prolonged and laborious study, since his feeling of insecurity demanded daily evidence of his importance in the world.

A's sexual drives continued to manifest themselves, and to challenge his resistances. He was continually alarmed by the lurking fear that he might be impotent. Although he proposed marriage to two girls when he was a theology student, it is significant that he chose girls from his immediate entourage, and effected an almost instantaneous recovery from his disappointments. This warrants the inference

that he was considerably relieved to postpone the test of his potency, and this inference is strengthened by the long years during which he cheerfully acquiesced in the postponement of his marriage to the woman who finally became his wife. He lived with people who valued sexual potency, particularly in its conventional and biological demonstration in marriage and children, and his unmarried state was the object of good-natured comment. His pastoral duties required him to "make calls" on the sisters of the church, and in spite of the cheer which he was sometimes able to bring to the bedridden, there was the faint whisper of a doubt that this was really a man's job. And though preaching was a socially respectable occupation, there was something of the ridiculous in the fact that one who had experienced very little of life should pass for a privileged censor of all mankind.

Mr. JUSTICE FORTAS, dissenting:

This is a criminal prosecution. Sam Ginsberg and his wife operate a luncheonette at which magazines are offered for sale. A 16-year-old boy was enlisted by his mother to go to the luncheonette and buy some "girlie" magazines so that Ginsberg could be prosecuted. He went there, picked two magazines from a display case, paid for them, and walked out. Ginsberg's offense was duly reported to the authorities. The power of the State of New York was invoked. Ginsberg was prosecuted and convicted. The court imposed only a suspended sentence. But as the majority here points out, under New York law this conviction may mean that Ginsberg will lose the license necessary to operate his luncheonette.

The two magazines that the 16-year-old boy selected are vulgar "girlie" periodicals. However tasteless and tawdry they may be, we have ruled (as the Court acknowledges) that magazines indistinguishable from them in content and offensiveness are not "obscene" within the constitutional standards heretofore applied. See, *e.g.*, *Gent v. Arkansas*, 386 U.S. 767 (1967). These rulings have been in cases involving adults.

The Court avoids facing the problem whether the magazines in the present case are "obscene" when viewed by a 16-year-old boy, although not "obscene" when viewed by someone 17 years of age or older. It says that Ginsberg's lawyer did not choose to challenge the conviction on the ground that the magazines are not "obscene." He chose only to attack the statute on its face. Therefore, the Court reasons, we need not look at the magazines and determine whether they may be excluded from the ambit of the First Amendment as "obscene" for purposes of this case. But this Court has made strong and comprehensive statements about its duty in First Amendment cases—statements with which I agree. See, *e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 187-190 (1964) (opinion of Brennan, J.).¹

In my judgment, the Court cannot properly avoid its fundamental duty to define "obscenity" for purposes of censorship of material sold to youths, merely because of counsel's position. By so doing the Court avoids the essence of the problem; for if the State's power to censor

¹ "[W]e reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether and material involved is constitutionally protected." 378 U.S., at 190. See *Cox v. Louisiana*, 379 U.S. 536, 545 n. 8 (1965).

freed from the prohibitions of the First Amendment depends upon obscenity, and if obscenity turns on the specific content of the publication, how can we sustain the conviction here without deciding whether the particular magazines in question are obscene?

The Court certainly cannot mean that the States and cities and counties and villages have unlimited power to withhold anything and everything that is written or pictorial from younger people. But it here justifies the conviction of Sam Ginsberg because the impact of the Constitution, it says, is variable, and what is not obscene for an adult may be obscene for a child. This it calls "variable obscenity." I do not disagree with this, but I insist that to assess the principle—certainly to apply it—the Court must define it. We must know the extent to which literature or pictures may be less offensive than *Roth* requires in order to be "obscene" for purposes of a statute confined to youth. See *Roth v. United States*, 354 U.S. 476 (1957).

I agree that the State in the exercise of its police power—even in the First Amendment domain—may make proper and careful differentiation between adults and children. But I do not agree that this power may be used on an arbitrary, free-wheeling basis. This is not a case where, on any standard enunciated by the Court, the magazines are obscene, nor one where the seller is at fault. Petitioner is being prosecuted for the sale of magazines which he had a right under the decisions of this Court to offer for sale, and he is being prosecuted without proof of "fault"—without even a claim that he deliberately, calculatedly sought to induce children to buy "obscene" material. Bookselling should not be a hazardous profession.

The conviction of Ginsberg on the present facts is a serious invasion of freedom. To sustain the conviction without inquiry as to whether the material is "obscene" and without any evidence of pushing or pandering, in face of this Court's asserted solicitude for First Amendment values, is to give the State a role in the rearing of children which is contrary to our traditions and to our conception of family responsibility. Cf. *In re Gault*, 387 U.S. 1 (1967). It begs the question to present this undefined, unlimited censorship as an aid to parents in the rearing of their children. This decision does not merely protect children from activities which all sensible parents would condemn. Rather, its undefined and unlimited approval of state censorship in this area denies to children free access to books and works of art to which many parents may wish their children to have uninhibited access. For denial of access to these magazines, without any standard or definition of their allegedly distinguishing characteristics is also denial of access to great works of art and literature.

If this statute were confined to the punishment of pushers or panders of vulgar literature I would not be so concerned by the Court's failure to circumscribe state power by defining its limits in terms of the meaning of "obscenity" in this field. The State's police power may, within very broad limits, protect the parents and their children from public aggression of panders and pushers. This is defensible on the theory that they cannot protect themselves from such assaults. But it does not follow that the State may convict a passive lunchette operator of a crime because a 16-year-old boy maliciously and designedly picks up and pays for two girlie magazines which are presumably *not* obscene.

I would therefore reverse the conviction on the basis of *Redrup v. New York*, 386 U.S. 767 (1967) and *Ginzburg v. United States*, 383 U.S. 463 (1966).

TROPIC FILM CORPORATION, PLAINTIFF

v.

PARAMOUNT PICTURES CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, AND MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
DEFENDANTS

No. 70 Civ. 926

United States District Court, S. D. New York, July 31, 1970

Action by part owner of motion picture against members of motion picture industry for injunctive relief and for treble damages. On plaintiff's motion for preliminary injunction, the District Court, Lasker, J., held that showing by part owner of motion picture was insufficient to warrant issuance of preliminary injunction restraining members of motion picture industry from carrying on asserted industrywide refusal to deal in and distribute, advertise and exhibit owner's film without rating showing lack of suitability for children affixed to it and to its advertising.

Motion denied.

1. *Injunction 152*

As prerequisites to granting of a preliminary injunction the court must find that plaintiff will probably succeed on merits of case and that without injunctive relief he will be irreparably damaged.

2. *Injunction 137(4)*

A preliminary injunction ought not to be granted where the record indicates that issues of fact exist which can only be resolved at trial.

3. *Injunction 136(3)*

Fact that harm to plaintiff is reparable is a sufficient ground for denial of a preliminary injunction.

4. *Monopolies 24(7)*

Showing by part owner of motion picture was insufficient to warrant issuance of preliminary injunction restraining members of motion picture industry from carrying on asserted industry-wide refusal to deal in and distribute, advertise and exhibit owner's film without rating showing lack of suitability for children affixed to it and to its advertising. Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26; Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

Dickstein, Shapiro & Galligan, New York City, for plaintiff; David I. Shapiro, New York City, Judah Best, Washington, D.C., of counsel.

E. Compton Timberlake, Walter J. Josiah, Jr., New York City, for defendants Paramount Pictures Corp. and Paramount Film Dis-

tributing Corp.; Albert C. Bickford, Anthony L. Fletcher, New York City, of counsel.

Phillips, Nizer, Benjamin, Krim & Ballon, New York City, for defendant Motion Picture Assn. of America, Inc.; Louis Nizer, Neil A. Pollio, New York City, of counsel.

LASKER, *District Judge*.

In this suit challenging the legality of the Motion Picture Code and Rating Program ("Program") adopted in 1968 by major trade associations within the motion picture industry, the plaintiff moves for preliminary relief. The cast of characters consists of:

Joseph Strick ("Strick"), producer and director of a motion picture entitled "Tropic of Cancer." Strick maintains this suit pursuant to authorization on behalf of plaintiff Tropic Film Corporation.

Tropic Film Corporation ("Tropic"), a Swiss corporation owning a 50 percent interest in the motion picture "Tropic of Cancer."

Paramount Pictures Corporation (successor by merger of its former wholly owned subsidiary, Paramount Film Distributing Corporation) ("Paramount"), a producer and distributor of motion pictures. Paramount owns the remaining 50 percent of the film "Tropic of Cancer."

Motion Picture Association of America, Inc. ("MPAA"), a motion picture distributors trade association.

Tropic sues under Section 6 of the Clayton Act (15 U.S.C. § 26) for injunctive relief against all parties defendant and for treble damages under Section 4 of the Act (15 U.S.C. § 15) against MPAA. The present application is for a preliminary injunction restraining defendants from carrying on an asserted industry-wide refusal to deal in and distribute, advertise and exhibit plaintiff's film "Tropic of Cancer" without an "X" rating affixed to it and to its advertising. The complaint alleges that defendants and co-conspirators have conspired, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), to refuse to exhibit, distribute or advertise the film without such a rating affixed.

In 1968 (under date of July 30 but signed November 19) Strick,¹ on behalf of "a company to be designated by him" (which in fact is Tropic Film Corporation), entered into an agreement with Paramount for the production and distribution of a motion picture based on Henry Miller's novel *Tropic of Cancer*. The picture was produced in accordance with the terms of the contract. Paramount financed the film, which cost approximately \$1,750,000, \$400,000 of which was paid to Strick² and is not recoverable by Paramount. In early 1970 the film, which was produced abroad, cleared United States Customs and was presented for rating to the committee established under the Pro-

¹ The plaintiff here is Tropic Film Corporation. MPAA takes the position, with considerable support in the record, that Strick rather than the corporation is the real party in interest as plaintiff. The relevance of this contention is that there is substantial evidence that Strick, though he did not specifically approve submission of the film for rating, knowingly acquiesced in that procedure, and that it would be inequitable to enjoin the defendants from pursuing a course of action which he knowingly allowed to occur. In view of the disposition of the motion set forth in the text below, I find it unnecessary to determine whether Strick or Tropic is the true party in interest as plaintiff.

² It appears from the record that the \$400,000 was paid by Paramount through Tropic to Strick, but there is no dispute that Strick has received the money and that neither he nor Tropic is under obligation to repay any of it to Paramount. Neither Tropic nor Strick was obligated to or in fact did contribute to the costs of the production.

gram for that purpose. The committee rated the film X, and it has been distributed and advertised with an X rating affixed.

I

Before outlining the contentions of the parties it is necessary to describe the procedure of the Program, which is the latest of a series of self-policing plans of the motion picture industry distinguishing films appropriate for adult viewing only from those appropriate for viewing by children. Although such programs or codes have existed since 1930, the current Program was initiated only in November 1968 and was largely influenced by the explosion of films containing explicitly sexual material both as to subject matter and photographic display.³ A further impulse to establishment of the current Program emanated from the 1968 decisions of the United States Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 2d 195, and *Interstate Circuit v. Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225. *Ginsberg* held constitutional a New York statute which made it unlawful to sell to a minor a ticket to a motion picture which depicts "nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors." *Dallas* found unconstitutionally vague an ordinance of the City of Dallas relating to the exhibition of "sexual promiscuity" or related matters to minors, but the decision taken together with *Ginsberg* was regarded by the industry as implying that a properly drawn ordinance might be found constitutional.

Desirous of continuing to exhibit films dealing frankly with sexual matters, and at the same time wishing to avoid what they felt might constitute an onslaught of legislative censorship, MPAA, together with the two other principal motion picture industry trade associations, International Film Importers and Distributors of America, Inc. ("IFIDA") and the National Association of Theatre Owners ("NATO"), announced the establishment of the Program on October 7, 1968. The affidavit of Jack Valenti (MPAA) and statements of Messrs. Podhorzer (IFIDA) and Rifkin (NATO) (attached to Valenti Affidavit) make it clear that the primary objective of the Program was "a concern for children." Indeed, there is no question that the Program rates films by any standard other than the suitability of viewing by children, or that it makes any attempt to rate the esthetic qualifications of a film. Under the present procedure, effective March 1, 1970 (not substantially different from its predecessor) the ratings are as follows:

G: All ages admitted.—General Audiences.

GP: All ages admitted.—Parental Guidance Suggested.

R: Restricted.—Under 17 requires accompanying Parent or Adult Guardian.

X: No one under 17 admitted.—(Age limit may vary in certain areas.)

³ Although the question of whether "Tropic of Cancer" is obscene is not in any way at issue (and if it were, presumably its admission by United States Customs constitutes a government admission that it is not), there is no dispute that the film is sexually explicit to an extreme degree, not only in the numerous portrayals of nudity and sexual activity, but also in the profuse use of ancient four-letter words of which in an earlier day Henry Miller was known as a daring pioneer. Nor does plaintiff appear to argue that the rating X is inappropriate for the film; rather, it is contended that the rating system is illegal as violating the antitrust laws.

MPAA is composed of nine producing-distributing motion picture companies who produce or distribute a very substantial majority of the films shown in this country. The members of MPAA have agreed to submit their films for rating. A picture designated X does not carry the word "Approved" or the seal of MPAA, whereas pictures otherwise rated do. This distinction applies also to advertising of a rated film which the members of MPAA (including Paramount) have agreed to. Although MPAA members have agreed to abide by the provisions of the Program, no producer or distributor is required to submit a film for rating, and even as to MPAA members there is no sanction for failure to adhere to the agreement. (Valenti Affidavit, pp. 7-8).

In this connection it is significant that at least one major exhibitor in the metropolitan area of New York (The Walter Reade Organization, Inc.) which is a member both of MPAA and IFIDA has consistently refused to abide by the Program, and that a major foreign import, "I am Curious—Yellow" has been distributed and exhibited in many parts of the country, although it was not submitted for rating under the Program nor did its producers voluntarily rate it.

Although NATO has not obligated itself or its members to enforce the Program, it has "pledged to ask its members to cooperate with the Rating Program and to voluntarily adhere thereto," but does not sanction members who refuse to do so. (Valenti Affidavit, pp. 6-7).

The Program provides procedural safeguards, including the right of an applicant to appeal a rating to the Code and Rating Appeals Board, comprised of the President of MPAA, 12 persons who are directors of MPAA or executive officers of its members, eight exhibitors chosen by NATO, two by IFIDA, and two producers designated by Producers Guild of America. The Appeals Board has enacted regulations providing a detailed procedure permitting both written presentation and oral testimony. The rating of "Tropic of Cancer" was not appealed.

II.

Contentions of the Parties

Plaintiff argues that the agreement among MPAA and its members, supplemented by the cooperative agreement of NATO, constitutes a classic conspiracy in restraint of trade—in particular, a group boycott in violation of the antitrust laws. The boycott results, according to plaintiff, in severe economic loss to it because a significant percentage of theatres in the country will not show X-rated films, a large number of newspapers throughout the country will not advertise X-rated films, and television networks and airlines will not exhibit X-rated films to their viewers or passengers. Plaintiff contends that there are four issues raised by this motion:

1. Is there an agreement or combination?
2. If so, is that agreement or combination in violation of the anti-trust laws?
3. If so, is plaintiff threatened with loss or damage thereby?
4. (In regard to this application for preliminary relief)—Is such threatened loss or damage so immediate and serve as to call for issuance of a preliminary injunction?

Defendants claim that the operation of the Program does not constitute either a restraint of trade or a group boycott; that any limitation on the exhibition of films by exhibitors, networks or airlines or the advertisement of the films by newspapers is entirely voluntary on the part of the exhibitors, networks, airlines and advertisers themselves; that, indeed, the same decisions would be reached by the same persons, whether or not an X rating was affixed to the film since the very content of any X-rated film—and in particular the “Tropic of Cancer”—makes it unsuitable for exhibition by networks⁴ and airlines, and prompts the limitations self-imposed by exhibitors and advertisers; and that not only is there no showing on the present state of the record of any actual or threatened loss or damage (i.e., loss of revenue from exhibition of the picture under an X rating) to the plaintiff, but the evidence indicates that the film is making and will make receipts as large as or greater than it would have made on a non-rated basis.

As to the issues posed by plaintiff, defendants contend (1) that there is no agreement or combination; (2) that consequently it is not in violation of the antitrust laws; (3) that the plaintiff is not threatened with loss or damage; and (4) that consequently there is no threat of immediate loss or damage.

III

The Merits of the Motion

This motion was argued extensively by counsel of high standing, voluminously documented, and exhaustively briefed. After careful consideration of the arguments presented, and a detailed reading of the numerous affidavits and able briefs, I have concluded that, in the circumstances of this case, a preliminary injunction should not be granted.

[1] As prerequisites to the granting of a preliminary injunction the court must find that the plaintiff will probably succeed on the merits of the case and that without injunctive relief he will be irreparably damaged. *Studebaker Corp. v. Gittlin*, 360 F. 2d 692 (2d Cir. 1966). *Symington Wayne Corp. v. Dresser Industries, Inc.*, 383 F. 2d 840 (2d Cir. 1967). I find that plaintiff has not established that it will probably succeed on the merits of this case nor that it will be irreparably damaged by the failure to secure an injunction. Furthermore, I believe that the balance of hardships and the equities of the case compel the conclusion that preliminary relief is not warranted.

A. Probability of success

In determining that the plaintiff has not demonstrated the probability of its succeeding on the merits, I have in mind the many obstacles which plaintiff must overcome in order to prevail. These impediments fall into two classes: factual difficulties and legal difficulties.

⁴ 18 U.S.C. § 1464 is entitled “Broadcasting obscene language” and reads: “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.”

The FCC has taken note of Section 1464 in its administration of the licensing provisions of the Federal Communications Act. See, e.g., *In Re WUIIY-FM*, Docket No. 46098, April 1, 1970. Even if the FCC had not focused attention on the statute, it is to be expected that the unqualified language of Section 1464 would put broadcasters on their mettle to watch the content of their material, whether rated or not.

1. *Factual difficulties*

The record is replete with sharp disputes between the parties as to the facts of the case and the disputes cannot be reconciled on the record as it stands. These differences include such central issues as the following:

The effect of the X rating.—Tropic-Strick contend that the X rating is misleading viewers to believe that "Tropic of Cancer" is not a work of art and that the X mark has come to constitute a stigma. The defendants answer that this is not so, since, for example, the winner of the motion picture Academy award for the best picture of 1969, "Midnight Cowboy," carried an X rating, and is not only regarded as a success d'estime but also has proven to be an enormously profitable film. Defendants also emphasize Strick's admission on his deposition that he himself has known of X-rated pictures that have been very successful at the box office and of non X-rated films that have done very poorly.

Limitation of newspaper advertisement.—Tropic-Strick argue that a very substantial number of American newspapers with extensive circulation refuse to accept advertising for an X-rated picture and that other newspapers will not permit "normal" advertising for such pictures. Strick's affidavit appears to establish that newspapers in cities with a total of several million in population and between one and two million in circulation engage in such practices. Defendants reply that only 25 of 1752 English language daily papers in the United States refuse to carry advertising for X pictures (Conte Affidavit, paras. 4 and 5); that these decisions are made by the publishers themselves; that the defendants not only are not responsible for such decisions, but have continually opposed them (Valenti Affidavit, para. 24); and that (as is undisputed) newspapers similarly refuse to advertise the well known but unrated film "I Am Curious—Yellow", so that it is reasonable to believe that if "Tropic of Cancer" were unrated it would nevertheless receive the same treatment.

Refusals of exhibitors to show X-rated films.—Tropic-Strick claim that 47 percent of the United States exhibitors refuse to show X-rated pictures. Defendants respond that the figure so quoted is derived from an outdated survey of no statistical validity,⁵ and that the determination as to whether to exhibit films of sexual explicitness such as "Tropic of Cancer" is made individually by exhibitors who would (and in the past did) make the same determination, based on the content of a film, whether the film was rated or not.

Television broadcasting.—Tropic-Strick argue strenuously that networks refuse, because of the X rating alone, to exhibit such films. Defendants contend (on the basis of affidavits from the manager of nighttime programs of the National Broadcasting Company, Inc., and the Vice President, Corporate Information, of National Broadcasting Company, Inc.) that the refusal to exhibit such films is based on the content and not the rating of the picture.

In-flight film showing.—Tropic-Strick assert, again, that refusal of airlines to show X-rated pictures is caused solely by the rating of the pictures, and defendants reply, once more (on the basis of the affidavit

⁵ Affidavit of Richard M. Durwood, film buyer for the Durwood Corporation, Kansas City, Missouri, operating more than 30 theatres in nine states.

of Max Fellerman, Vice President of Inflight Motion Pictures, Inc.) that the decision is made on content, not rating.

Municipal prohibition.—Tropic-Strick argue that a number of municipalities have enacted ordinances which prohibit the showing of "X pictures." Defendants answer that the assertion is false and that in any event such municipal action, if it occurs, is over the strenuous opposition of the motion picture industry. In this connection, rather serious doubt is cast on plaintiff's position by the affidavits of Barbara Scott, deputy attorney in charge of censorship matters of the motion picture industry, contradicting Strick's specific reference to an ordinance of the Town of Holyoke, Massachusetts, flatly denying that Holyoke has enacted any such ordinance, and asserting without qualification that X-rated pictures are indeed being shown there.

The nature of the Program.—Strick alleges that the members of MPAA, IFIDA and NATO are required to abide by the Program. Defendants vigorously contend, and there is substantial evidence in the record to support the contention, that members of these organizations are not only free to reject the Program, but in fact have done so and continue to do so.

[2] The sharpness and comprehensiveness of these factual disputes is significant, in view of the frequently pronounced rule that a preliminary injunction ought not to be granted where the record indicates that issues of fact exist which can only be resolved at trial. See, e.g., *American Fabrics Co. v. Lace Art, Inc.*, 291 F. Supp. 589, 590 (S.D.N.Y. 1968); *Vanguard Recording Society, Inc. v. Kveskin*, 276 F. Supp. 563, 565 (S.D.N.Y. 1967); *Afran Transport Company v. National Maritime Union*, 175 F. Supp. 285, 287 (S.D.N.Y. 1959); and *601 West 26 Corp. v. Solitron Devices, Inc.*, 420 F. 2d 293, 294 (2d Cir. 1969), in which the court observed:

"The elaborate affidavits submitted by the parties illustrate that the factual issues are vigorously disputed and it is anything but clear that plaintiff will prevail on the merits. See *Willheim v. Investors Diversified Services, Inc.*, 303 F. 2d 276 (2d Cir. 1962)."

However, although this caveat of the courts is a significant factor in determining whether preliminary relief should be granted, I by no means base my determination of this motion on the caveat alone.

2. Legal difficulties

This suit alleges a conspiracy in restraint of trade, specifically a group boycott, in violation of various provisions of the antitrust laws cited above. Does it appear probable that plaintiff will prevail at trial in establishing the illegality of the "Program"? Without, of course, ruling on the merits of this complicated proposition, I find that on the present state of the record the plaintiff has not demonstrated such a probability.

Plaintiff places its principal reliance on such leading cases as *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). In my view, plaintiff's citation of these and other related cases is in the main inapposite. Plaintiff argues that *Silver* stands for

the proposition that "whatever reason defendants urge to justify their action challenged here, whether it be purely commercial or based on a more elaborate social justification, defendants cannot escape the reach of the Sherman Act." (Plaintiff's Memorandum, pp. 10-11). In *Silver*, the New York Stock Exchange had, without giving reason for its action, ordered the discontinuance of direct-wire telephone connections between certain members of the New York Stock Exchange and non-members. The result was that one of the petitioners was forced out of business and the other's business was greatly diminished. The factual differences between *Silver* and the instant case are apparent. Here the defendants' "self-regulation" (i.e., the rating of "Tropic of Cancer") occurred pursuant to the contract between the parties to this suit and voluntary submission by the party having the right to distribute the film.⁶ Clear and pre-announced standards were applied in the rating process, and an appeal system (not used here) was available permitting written presentation and oral argument. These distinctions are of importance in view of the Supreme Court's emphasis in *Silver*, 373 U.S. at 361, 83 S.Ct. at 1259:

"The final question here is, therefore, whether the act of self-regulation in this case was so justified. The answer to that question is that it was not, *because the collective refusal to continue the private wires occurred under totally unjustifiable circumstances.*" [Emphasis added.]

And again,

"[I]t is clear that no justification can be offered for self-regulation conducted *without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position.*" [Emphasis added.]

Putting aside these important distinctions, a reading of *Silver* shows that, far from determining that every group boycott automatically constitutes a *per se* violation, the Court held rather that "absent any justification derived from the policy of another statute *or otherwise*,"⁷

That *Silver* does not stand for the proposition that group boycotts are *per se* illegal is made clear in the opinion of the Court of Appeals of this Circuit in *Cowen v. New York Stock Exchange* (a post-*Silver* case), 371 F. 2d 661 (1967), in which the court remarked in reference to plaintiff's discharge by the Stock Exchange (at 664) that

"* * * his discharge is * * * an instance 'of exchange self-regulation which fall[s] within the scope and purposes of the Securities Exchange Act [and] may be regarded as justified in answer to the assertion of an antitrust claim.' *Silver v. New York Stock Exchange*, supra, 373 U.S. at 361. 83 S. Ct. at 1259. Indeed,

⁶ Paragraph 17 of the contract states: "Paramount will have right to determine manner of selling and advertising picture, but agrees to consult with Strick on general campaigns. Paramount also to have right to publicize before, during and after production, but will consult with Strick before issuance."

Strick construes this to mean that "Paramount shall have control of advertising of the completed film." (Deposition of Strick, p. 84).

⁷ Notice the importance attached to the words "or otherwise" by commentators on *Silver*. See, e.g., Trade Association Exclusionary Practices, 66 Columbia L. Rev. 1486, at 1498; and Sherman Act Limited on Noncommercial Concerted Refusals to Deal, 1970 Duke L.J. 247 at 276. Both commentators italicize the words "or otherwise" and both articles establish with abundant clarity that, however strong the language of *Silver*, it does not stand for the proposition and the court has not ruled that group boycotts are *per se* violations of the Act.

even absent a statutory duty of self-regulation such as that under the Securities Exchange Act, similar self-regulatory activities involving refusals to deal have been held not to violate the anti-trust laws. See *Deesen v. Professional Golfers Ass'n*, 358 F. 2d 165 (9th Cir.), cert. denied, 385 U.S. 846, 87 S. Ct. 72, 17 L. Ed. 2d 76 (1966). See generally, [Note] Trade Association Exclusionary Practices: an Affirmative Role for the Rule of Reason, 66 Colum. L. Rev. 1486 (1966)."

See also *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 76-79 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970).

In *Radiant Burners, supra* (which held merely that a claim was stated and was not a decision on the merits), the complaint alleged that gas burners manufactured by plaintiff had been improperly refused approval by the defendants, who had formed an association for the testing and granting of seals of approval of such burners; that some of the defendants, gas sellers, had refused to sell gas for plaintiff's burners, while they sold gas for use in the approved burners manufactured by others, and that the plaintiff was therefore excluded from the market. Without regard to the difference between whether a claim has been stated on the one hand (as in *Radiant*) and, on the other, whether the probability exists that it will be proven at trial (as here), there are two important distinctions between *Radiant* and the present case—first, that the defendants in *Radiant* arbitrarily refused to grant approval to plaintiff's products and, second, that the action of the defendants was clearly and designedly anti-competitive, injuring the plaintiff and benefiting defendants. Here, it is clear that the affixation of the X rating was not arbitrarily imposed (indeed, plaintiff does not even make such a contention, and the defendants' actions are unrelated to competitive motives).

In *Fashion Originators' Guild, supra*, the Supreme Court held illegal a combination of manufacturers of women's garments which refused all sales to manufacturers and retailers who dealt in copies of their garments, or would not agree not to sell copies. The Court found that the purpose of the conspiracy and its potentiality was to create a monopoly, particularly in view of the coercion which it brought to bear on rival methods of competition. No such considerations exist in relation to the Program here in question, the purposes of which are not designed to eliminate competition but to advise motion picture exhibitors and, through them, the public, of the content of films which the Supreme Court has held that states have the constitutional right to prevent minors under 17 from viewing.

In *Klor's, Inc., supra*, a chain of department stores and numerous manufacturers and distributors admittedly conspired not to sell to petitioner (or to do so only at discretionary prices). The Court in *Klor's* held merely, reversing lower decisions, that the undisputed group boycott was "not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." 359 U.S. at 213, 79 S. Ct. at 710. The case here is entirely different. No admitted conspiracy exists, no sanction exists to penalize any member of the Program-subscribing organization who does not abide by the Program, and the defendants may well

establish at trial that the Program is justified and hence legal, in view of its purposes and effects.

I have not attempted, in this analysis of the decisions upon which plaintiff principally relies and of the differences between them and the instant case, to deal with the many other opinions cited by both plaintiff and defendants. However, a reading of those cases does not alter my view that plaintiff has not demonstrated a probability of success at trial.

B. Irreparable damage

[3] Putting aside the question of whether plaintiff will probably succeed at trial, I find that failure to grant an injunction here will not irreparably damage plaintiff. Other than the permanent injunction which it seeks, the complaint demands only money damages, based on alleged loss of revenues assertedly flowing from the showing of "Tropic of Cancer" under an X rating. Even if one assumes, *arguendo* (and it is by no means demonstrated), that the plaintiff's claims of lost revenues are correct, no showing has been made that plaintiff's damages cannot be fully and promptly remedied by the granting of a money judgment against the defendants. Indeed, no attempts at such a showing has been made by the plaintiff, and it is reasonable to assume that its failure to do so is evidence of the financial strength of defendants and their ability to pay whatever damage judgment might be granted in this case. Whatever harm plaintiff may be shown to have suffered, then, is clearly reparable. That fact alone is sufficient ground for the denial of a preliminary injunction.

C. Equitable considerations

Even if the considerations expressed above were not controlling (as I believe they are), surely the equities of this case favor denial of preliminary relief. Tropic-Strick have already received, under the contract, \$400,000 for the making of the film "Tropic of Cancer" which they are not obligated to repay. On the other hand, Paramount has received nothing and has expended \$1,075,000, as well as advertising and distribution costs (less receipts from rentals to date). While it is impossible to decide on a preliminary record (assuming it is possible to decide at all) whether the X rating will help or hurt profitability of the film, it seems equitable that where doubts exist they should be decided in favor of the party with the larger stake in the venture (to say nothing of the party with the larger experience in film distribution). In this connection it is to be remembered that Paramount is entitled not only to recover its costs from the film, but that after its costs are recovered Paramount continues to share the film revenues equally with Tropic-Strick. Furthermore, it is not disputed that the contract grants Paramount the sole "right to determine manner of selling and advertising picture," and where there is doubt as to whether plaintiff will prevail, it appears just to permit Paramount to exercise its uncontested contractual right without impediment.

[4] Finally, it is to be noted that a clear public interest exists which will be affected by the court's action in this case. Such Supreme Court decisions as *Ginsberg* and *Dallas* have held this interest to be constitutionally significant. Except upon a strong showing, not here presented, that the plaintiff will probably succeed at trial, it would be

improper for the court to restrain defendants from operating the Program, which at the very least gives the public some information about the content of the films offered for their viewing. As the Supreme Court stated in *Yakus v. United States*, 321 U.S. 414, 440-441, 64 S.Ct. 660, 675, 88 L.Ed. 834 (1944):

“* * * where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-673, 47 S.Ct. 222, 228, 71 L.Ed. 463; (other citations omitted). This is but another application of the principle, declared in *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789, that ‘Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.’”

Pursuant to Rule 52(a), this opinion constitutes the court's findings of fact and conclusions of law.

For the reasons stated above the motion for a preliminary injunction is denied.

It is so ordered.



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